CONSTITUTIONAL AUTONOMY: LEGAL IMPLICATIONS FOR THE STATE UNIVERSITY SYSTEM OF FLORIDA

By

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Abstract of a Dissertation Presented to the Graduate Council of the University of Florida in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy

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In contrast to statutorily created higher education systems, there are states which have constitutions judicially interpreted to provide for an autonomous public higher education system. "Constitutional autonomy" refers to the exclusive management and control of an institution or system vested by state constitutional provision and affirmed by case law.

The purpose of this study was to identify and analyze state constitutions, judicial decisions, legislative enactments, and rulings of state attorneys general related to constitutionally autonomous university systems in the United States. One research objective was to clarify the legal relationship between constitutionally autonomous state university systems and other state governmental entities. A second research objective was to assess the legal consequences of adopting a constitutional provision granting autonomy to Florida's higher education governing board.

The study is divided into three major parts. Part one traces the historical development of autonomous American higher education systems from the colonial period through the twentieth century. This examination supports the proposition that despite a historical tradition of autonomy in higher education the intervention of state government into higher education affairs has intensified in the twentieth century. In part two, twenty states which make constitutional provision for public higher education are identified and the legal status of the public higher education system in each state is analyzed. This analysis confirms the hypothesis that constitutional autonomy must be affirmed by judicial decision to be operative. In the third part, case law defining the powers of constitutionally autonomous higher education systems is synthesized, a constitutional provision granting autonomy to the Board of Regents of the State University System of Florida is proposed, and the legal effect of the constitutional provision is assessed.

It is a conclusion of this study that a higher education governing board which has been judicially held to be a constitutionally autonomous corporate entity has full legal power in the conduct of exclusively university system affairs. In general, the governing board may exercise all powers connected with the proper and efficient governance of the university system. The legislature may prescribe

additional powers and duties, but none conferred on the governing board by the constitution can be modified or transferred to any other state agency. Nevertheless, a constitutionally autonomous higher education system could not abridge rights protected by the federal or state constitution, and would be subject to state legislation enforcing state-wide standards for public welfare, health, and safety. While delineation of the exact line between matters which are of state-wide concern and matters of exclusively higher education concern must ultimately be resolved by courts of the particular jurisdiction, legal precedents which have established the doctrine of constitutional autonomy could be relied on to reduce the number of issues subject to litigation.

CHAPTER ONE

INTRODUCTION AND OVERVIEW OF THE STUDY

The autonomy of American higher education institutions is based upon historical tradition. Colonial colleges were sponsored by religious groups and were granted reasonable autonomy from state government interference. As state colleges and universities developed, they were modeled in part upon the concept of institutional autonomy that evolved from the colonial college tradition. However, by the 1900's public demand for expanded higher education opportunity impelled states to subsidize the college and university, and state government began to exercise concomitant influence over the affairs of public higher education institutions. In the twentieth century, higher education has been transformed from sectarian to secular purposes, affording social mobility and providing technological problem solving, but the need for substantial financial support from state and federal government has placed limitations on our colleges and universities.

State budget controls over financial support, coupled with administrative centralization in state government

operation, threaten the traditional notion of autonomous higher education. The Carnegie Commission on Higher Education has contended that public higher education is a function of society rather than of government, that colleges and universities perform most effectively and efficiently when control rests with the university system, and that academic and administrative freedom are essential to the future of higher education.[1] After assessing the extent of encroachments by state government offices and departments, the Commission concluded that independence from governmental interference in the operation of colleges and universities is a priority issue in the 1970's.[2]

All states have made provision for public institutions of higher education under authority of the residual powers specified in the tenth amendment to the United States Constitution. Thirty-four state constitutions contain provisions which make reference to public higher education. In most states the higher education system is subordinate to various state government departments. Where higher education is subordinate to other branches of state government, the boards

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[1] Carnegie Commission on Higher Education, Governance of Higher Education: Six Priority Problems 20-24 (1973).

[2] Id. at 19.

governing public colleges and universities operate either as primary agencies responsible directly to the executive or legislative branch or as secondary agencies responsible to state administrative agencies.[3]

In contrast to states in which higher education is subordinate to other branches of government, there are states which have constitutions judicially interpreted to provide for an autonomous public higher education system. Legal challenges to the authority of the constitutionally mandated higher education governing body in these states have resulted in findings that the state constitution confers a legal status on the governing board equal to that of the legislature or the executive.[4] These constitutionally autonomous state higher education systems are considered to be removed from the direct and immediate control of the legislature and executive, while states which confer no constitutional status allow public institutions of higher education to be continuously subject to legislative and executive prerogative.[5]

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[3]S. K. Alexander & E. S. Solomon, College and University Law 40 (1972).

[4]See People v. Kewen, 69 Cal. 215, 10 P. 393 (1886), Sterling v. Bd. of Regents of Univ. of Mich., 110 Mich. 369, 69 N.W. 253 (1896), and State ex rel. Univ. of Minn. v. Chase, 175 Minn. 259, 220 N.W. 951 (1928).

[5]L. A. Glenny & T. D. Dalglish, Public Universities, State Agencies and the Law: Constitutional Autonomy in Decline 144 (1973).

The Florida Constitution of 1968 conferred no autonomy on public higher education. Florida's Board of Regents, the governing body of the State University System, was created by legislative enactment in 1905 and was subjected to legislative prerogative and control by the State Board of Education.[6] Florida's constitution required that "adequate provision shall be made by law . . . for the establishment, maintenance and operation of institutions of higher learning"[7] but contained no specific provision granting the Regents power to govern the higher education system.

A constitutional provision granting control and management of the State University System of Florida to the Florida Board of Regents will have consequences for Florida statute law and for the legally defined relationship between higher education and state offices and agencies. If such a constitutional provision receives consideration from Florida's 1978 Constitutional Revision Commission, an analysis of the legal status of constitutionally autonomous higher education systems together with an assessment of the legal impact of adoption in Florida, will be essential to Commission deliberations.

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[6] See Fla. Stat. §§ 240.001, 240.031 (1975).

[7] Fla. Const. art IX, § 1.

Purposes of the Study

There are two purposes for this study. First, a purpose of this study is to identify and analyze state constitutions, judicial decisions, legislative enactments and rulings of state attorneys general related to the development of constitutionally autonomous university systems in the states of the United States. The goal of this analysis is to clarify the legal relationship between constitutionally autonomous state university systems and external state governmental entities such as the legislature, governor, and administrative agencies. Second, a purpose of this study is to assess the legal consequences of adopting a constitutionally autonomous system of public higher education in Florida. By assessing the impact of such a constitutional provision on the powers of the Board of Regents of the State University System of Florida, this study will provide recommendations for use by Florida's 1978 Constitutional Revision Commission.

Justification for the Study

Periodic assessment of the relationship between constitutionally autonomous public university systems and state government has been emphasized by several authorities. Alexander and Solomon stressed that an investigation of the

development of the autonomous university systems in Michigan, Minnesota and California is "important to the student's understanding of the legal structure within which universities function."[8] Moos and Rourke argued that developments toward centralization of government functions may erode the independent status of constitutionally autonomous state university systems.[9] Glenny and Dalglish produced survey research data which distinguished the constitutionally autonomous university system from its statutorily created counterpart, but warned that " . . . the constitutional language itself may require reinterpretation from time to time in order to find the degree of autonomy left to the CS [constitutional status] university."[10] The implication offered by these authorities is that the legal status of the constitutionally autonomous university system is subject to reinterpretation and change over time. Consequently, periodic investigation of the development and legal status of constitutionally autonomous university systems will advance knowledge and enhance understanding of this legal phenomenon.

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[8] S. K. Alexander & E. S. Solomon, supra note 3, at 26.

[9] M. Moos & F. E. Rourke, The Campus and the State 3-10 (1959).

[10] L. A. Glenny & T. D. Dalglish, supra note 5, at 143, 144.

In addition to the broad goals of enhancing knowledge and contributing to understanding, the study of the legal relationship between a constitutionally autonomous system of higher education and state government has specific application in Florida. Article XI, section 2 of the Florida Constitution calls for the establishment of a revision commission in 1978. The legal context in which to clothe the public higher education system in Florida may well be a subject for the commission agenda. Therefore, a study of the legal status accorded constitutionally autonomous state university systems and an assessment of the consequences of adopting such a system in Florida may be useful in commission deliberations.

Limitations and Delimitations

With the exception of Florida, this study is delimited to the identification and analysis of legal opinions originating in states of the United States which specifically refer to the relationship between constitutional status public university systems and other branches or agencies of state government. The study is further delimited to an analysis of the legal status of university systems which have been judicially held to be constitutionally autonomous. The diverse organizational forms which distinguish the

governance and coordination of state higher education systems and the extra-legal impact of political decision making on higher education policy are not analyzed except as these phenomena receive judicial notice and analysis relative to a constitutionally autonomous university system and other branches of state government.

Procedures

An historical-legal approach and reasoning by analogy[11] served as a basis for investigating the status of constitutionally autonomous university systems. Resource materials utilized to identify primary sources within the National Reporter System include the legal card catalog, legal periodicals found in the Index to Legal Periodicals and Education Index, the American Digest System, Sheppard's Citations, American Law Reports, American Jurisprudence, Corpus Juris Secundum, Descriptive Word Index, Words and Phrases, and Westlaw computer searches.

In the initial phase of research, attorney general opinions and court cases were identified through the use of secondary sources and by reference to citations found in reported decisions. Selected attorney general opinions and

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[11] See E. Levi, An Introduction to Legal Reasoning (1949).

cases from jurisdictions in which the state constitution appears to grant constitutional power to the higher education governing board or boards were analyzed, and a state-by-state legal history of the development of constitutionally autonomous university systems was prepared. This research was conducted utilizing the resources of the University of Florida Law Library, supplemented, where necessary, by information obtained by letter and questionnaire directed to state attorneys general.

From this compilation of legal opinion and case law, constitutionally autonomous state university systems were identified and intensively examined on the basis of legally defined state control over development of higher education programs, management of programs, and allocation of resources to and among programs. Based on these examinations the consequences of adopting a constitutionally autonomous system of higher education in Florida, giving special attention to the legal ramifications of adoption on the powers of the state university system's governing body, were assessed.

Definition of Terms

Autonomy. "The right (and condition) of power of self government."[12]

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[12]H. C. Black, Black's Law Dictionary 170 (4th ed. 1968).

Case law. "The aggregate of reported cases as forming a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudged cases . . ."[13]

Constitutional autonomy. Exclusive management and control of an institution or system vested by state constitutional provision and affirmed by case law.

Constitutional law. "That branch of the public law of a state which treats on the organization and frame of government, the organs and powers of sovereignty, the distribution of political and governmental authorities and functions . . . which prescribes generally the plan and method according to which public affairs of the state are to be administered.[14]

Constitutional status. Provision in the state constitution mandating creation of an institution or system and vesting some measure of power of governance in a governing board or boards.

Governing board. A body which possesses legal authority to manage an institution or system within a state higher education network (variously named board of trustees, board of control, or board of regents).

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[13] H. C. Black, supra note 12, at 272.

[14] Id. at 385.

Precedent. "An adjudged case or decision of a court of justice, considered as furnishing an example or authority for an identical or similar case afterwards arising on a similar question of law."[15]

Public corporation. "One created by the state for political purposes and to act as an agency in the administration of civil government, generally within a particular territory or subdivision of the state."[16]

Stare decisis. "To abide by, or adhere to decided cases. Policy of courts to stand by precedent and not to disturb a settled point."[17]

State university system. The organizational structure of the component public higher education institutions of a state.

Statutory. "Relating to a statute; created or defined by a statute; required by a statute; conforming to a statute."[18]

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[15] H. C. Black, supra note 12, at 340.

[16] Id. at 409.

[17] Id. at 411.

[18] Id. at 1577.

CHAPTER TWO

HISTORICAL DEVELOPMENT OF AUTONOMOUS AMERICAN HIGHER EDUCATION SYSTEMS

Three distinguishable phases characterize the development of a unique relationship between higher education and state government in the United States. The first phase, extending from the colonial period through the American revolution, may be said to have come to a close with the onset of the Civil War. This first phase in the development of American colleges and universities was marked by the creation of autonomous colleges, organized by religious groups through the charter of private corporations. A second phase began with the initiation of land-grant colleges and the evolution of state universities in the latter half of the nineteenth century. Exemplified by the development of constitutionally autonomous state universities in the Midwest and West, this second phase was characterized by the expansion of educational opportunity and the enunciation of broad, secular educational goals for colleges and universities. American higher education's third phase paralleled the expansion of state government and the trend toward centralization of state administrative functions that began in

the 1900's. This third phase reflected the increased dependence of public and private higher education upon state and federal financial resources and the concomitant intrusion of state government into the operation of higher education systems.

The Colonial Heritage

The history of colleges and universities in the United States has been viewed as a transformation from religious to secular purposes.[1] America's first higher education institutions, founded during the colonial period, were predominately sponsored by religious organizations for the training of ministers in the classical tradition. Puritans established Harvard College in 1636 and Yale in 1702. William and Mary, established in 1693, was Anglican. Princeton, King's College (Columbia), Brown, Queen's College (Rutgers), and Dartmouth, all established before 1776, were organized respectively by Presbyterian, Episcopalian, Baptist, Reform, and Congregational church groups.[2]

These colonial colleges were designed to train the elite in the religious principles of the regionally dominant denomination and in the classical principles that reflected

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[1] See R. Hofstader & C. D. Hardy, The Development and Scope of Higher Education in the United States (1952).

[2] F. Rudolph, The American College and University: A History 2 (1962).

the English curriculum of Oxford and Cambridge.[3] Applicants for admission were required to have proficiency in Latin and Greek in order that these languages could be used "as the tools with which teacher and student found their way through Aristotle's three philosophies and through the liberal arts of the Medieval curriculum."[4] The extent of the college's religious function was clear from the percent of graduates entering the ministry. In the 1640s, about 90 percent of Harvard's graduates became clergymen, a figure that was considered typical of many of the early colonial colleges.[5]

Colonial colleges received public subsidies and charters from crown or colonial legislature. Yet these institutions refused to surrender policy control to the state. Public subsidies included direct grants, assignments of income from taxes or duties, tax exemptions, and permission to conduct lotteries on behalf of the college fund.[6] While a state might confer charter privileges and grant subsidies to the colonial college, the concept of the college as a state

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[3] See J. S. Brubacher & W. Rudy, Higher Education in Transition: A History of American Colleges and Universities 3-11 (3d ed. 1976).

[4] F. Rudolph, supra note 2, at 251.

[5] R. Hofstader and C. D. Hardy, supra note 1, at 6.

[6] J. S. Brubacher and W. Rudy, supra note 3, at 35, 36.

institution was unfamiliar. As Rudolph points out

> [I]t would be misleading to speak of the colonial college as a state institution in the sense in which the term was later understood. State officials were given a degree of control over Harvard by the charter provision that guaranteed representation on the board of overseers, but Yale was governed during the colonial period by a board composed entirely of clergymen. When Princeton in 1748 added the governor of New Jersey and four members of his council to its board of trustees, this action was taken as insurance against possible consequences of the religious controversies of the time rather than as an avowal of significant ties with the state.[7]

The legal autonomy of the colonial college, relative to interference by state government, was resolved in 1819 by the United States Supreme Court. In 1816 New Hampshire's legislature made the assumption that Dartmouth College, chartered by King George III in 1769, was subject to legislation creating a state board of overseers to govern the college. Dartmouth's original trustees were denied recovery of the property of the college when the state superior court upheld the legislature's restructuring of the college's governance to insure state control. On writ of error to the United States Supreme Court the trustees argued that Dartmouth College was privately founded and endowed and the charter granted no power to the state to

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[7] F. Rudolph, supra note 2, at 15-16.

alter or amend the corporate nature of the institution. In Trustees of Dartmouth College v. Woodward[8] Chief Justice John Marshall ruled that the founders had "contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves."[9] Marshall reasoned that the corporate charter was a contract between the state and the incorporators and that the legislative attempt to restructure Dartmouth's governance was a material alteration of the charter, violative of the constitutional prohibition against state legislation impairing the obligation of contracts.[10]

In pleading on behalf of the Dartmouth trustees, Daniel Webster argued the case for all the colonial colleges.

> They have flourished, hitherto, and have become in high degree respectable and useful to the community. They have all a common principle of existence--the inviolability of their charters. It will be a dangerous, a most dangerous experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuations of political opinions. . . . Benefactors will have no certainty of effecting the object of their bounty; and learned men will be deterred from devoting themselves to the service of such institutions, from the precarious

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[8] 17 U.S. (4 Wheat) 518, 4 L.Ed. 629 (1819).

[9] Id. at 652, 4 L.Ed. at 663.

[10] U.S. Const. art. I, § 10.

> title of their officers. Colleges and halls will be deserted by all better spirits, and become a theater for the contention of politics. Party and faction will be cherished in the places consecrated to piety and learning.[11]

In supporting plaintiffs in error Webster discussed a decision of the North Carolina Supreme Court which was significant in its implications for the development of state universities. In Trustees of the University of North Carolina v. Foy[12] the North Carolina Supreme Court was asked to determine the validity of an act which repealed a grant to the university of "all the property that had theretofore or should thereafter escheat to the state."[13] In a decision that predated Dartmouth College by fourteen years, the court ruled that the state constitution imposed a responsibility on the legislature to establish the university.

> The Constitution directed the General Assembly to establish this institution and endow it; . . . The Constitution and not the Legislature had erected this corporation; the Legislature being only the agent or instrument, whose acts are binding only when they do not contravene any of the provisions of the Constitution. We view this corporation as standing on higher grounds than any other aggregate corporation; it is not only protected by common law but sanctioned by the Constitution.[14] [emphasis added]

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[11] 17 U.S. (4 Wheat) at 598, 4 L.Ed. at 650.

[12] 5 N.C. 57 (1805).

[13] Id.

[14] Id. at 61.

The North Carolina court went on to say that the power of the legislature ceased with the discharge of the constitutional injunction to establish the university. As the proposed repeal would have the effect of denying a vested right to the property which had been granted when the legislature founded and endowed the university, the repeal was violative of a state constitutional provision assuring due process of law to "free men."[15]

The decision in Foy gave the University of North Carolina a unique status. Prior to the twentieth century, courts in several jurisdictions took the position that a state university enjoyed a legal position similar to that of the privately incorporated college,[16] but the University of North Carolina was the first state institution acknowledged to have a constitutional status which placed the university beyond the reach of state legislative interference. North Carolina's constitutional mandate specified "that a school or schools be established by the Legislature . . . ; and all useful learning shall be encouraged and promoted in one or

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[15] Id. at 62.

[16] See Bd. of Educ. v. Greenbaum & Sons, 36 Ill. 610 (1864); Regents of the Univ. of Md. v. Williams, 9 Gill L.J. 365 (Md. 1838); State ex rel. Finley v. Bryce, 7 Ohio (Pt. II) 82 (1836).

more universities."[17] The North Carolina Supreme Court extended this language to mean that the trustees of the university were "in some measure the agents of the people, clothed with the power of disposing of and applying the property thus vested . . . over which the power of the Legislature ceased."[18]

In the period of these decisions the emphasis on religious training based on the classical English tradition had given way to a broader, secular curriculum emphasizing philosophy and natural science. Rudolph note that as early as 1776 "six of the eight colonial colleges supported professorships of mathematics and natural philosophy."[19] Beginning in 1800, new subjects such as English grammar and composition, geography, ancient history, United States history, algebra and geometry had become part of higher education admission requirements.[20] In the 1740's about 45 percent of Harvard's graduates had become ministers, a figure that dropped to 10 percent by the 1840's.[21]

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[17] N.C. Const. of 1776, art. XLI.

[18] 5 N.C. at 62. Contra Univ. of N.C. v. Maultsby, 43 N.C. 257 (1852) wherein the North Carolina Supreme Court declared the university a public institution and reversed the holding in Foy.

[19] F. Rudolph, supra note 2, at 31.

[20] R. Holstader and C. D. Hardy, supra note 1, at 10.

[21] Id., at 6-7.

During this same period the expansion and diversification of higher education in the century following the Civil War was foreshadowed by the initiation of innovative new institutions. In 1824, the United States had its "first distinct and separate technical school,"[22] Rensselaer Polytechnic Institute. Oberlin College became the "prototype of the American coeducational college"[23] with its decision to admit women in 1833. Wesleyan Female College became the first institution to confer degrees on women in 1836.[24]

The most expansive new forms of higher education, however, were the state colleges and universities initiated through the federal land grants authorized to each newly admitted state beginning with a grant of land to the Ohio Company in 1787.[25] Congress' charge to the territorial governments stipulated "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[26]

In implementing this charge, land grants to the Ohio Company resulted in the founding of Ohio University at

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[22] J. S. Brubacher & W. Rudy, supra note 3, at 61.

[23] Id. at 66.

[24] Id. at 64-65.

[25] F. Rudolph, supra note 2, at 275-276.

[26] Stat. Vol. 1, art. III, at 52 (1789).

Athens and Miami University at Oxford. Thus a pattern of governmental involvement in the development of institutions of higher education was established, which provided each state thereafter admitted to the union with more than 46,000 acres of public lands to support state higher education.[27]

Despite the subtle changes in higher education reflected by developing trends in curriculum and institutional diversity among American colleges and universities, the secularization process was not complete. As historian Donald Tewksbury noted in assessing American higher education prior to 1860, "with the exception of a few state universities practically all the colleges founded between the Revolution and the Civil War were organized, supported, and in most cases controlled by religious interests."[28]

The Constitutionally Autonomous University

In the period immediately prior to and following the Civil War a multitude of factors converged to create the conditions which elevated the state university to a position of prominence in the history of American higher education. Brubacher and Willis wrote:

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[27] F. Rudolph, supra note 2, at 276. Texas, Maine and West Virginia did not benefit from the land grants because the federal government owned no land in these states.

[28] D. Tewksbury, The Founding of American Colleges and Universities Before the Civil War 55 (1932).

> The growth of universities in America was brought about by many factors--the rationalism and empiricism of the Enlightenment, the impact of American and French revolutions, the influence of the resurgent German universities of the nineteenth century, and the utilitarian need for incorporating new fields of knowledge such as science and modern languages into the curriculum to serve the requirements of an expanding society.[29]

A significant encouragement to the growth of the university was federal legislation providing financial support for higher education teaching and research. The Morrill Act of 1862 permitted federal grants for a college "where the leading object shall be . . . to teach such branches of learning as are related to agriculture and the mechanical arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes."[30] Under the terms of the act 10 percent of the proceeds of the sale of public lands was available for the purchase of a site for an institution and the remainder served as a permanent endowment fund for the benefit of the institution. Subsequent to the Morrill Act, Congress passed the Hatch Act of 1887, establishing agricultural experiment stations designed to augment the discovery and dissemination of scientific subject matter initiated by the land-grant institutions.[31] In

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[29] J. S. Brubacher & W. Rudy, supra note 3, at 143.

[30] Stat. ch. 130 (1862).

[31] 7 U.S.C. § 362 (1952).

1890, the second Morrill Act provided annual federal appropriations supplementing the income of these institutions.[32]

State financial support for public higher education became imperative following the federal example. In 1873, regular state tax support to maintain the University of Michigan was provided in the form of proceeds from a tax of one-twentieth of a mill on all the ratable property of the state.[33] By 1908, California, Illinois, Wisconsin and Michigan were each contributing a million dollars or more annually to their respective state universities.[34]

Increased state and federal financial support for public higher education was associated with a growth in enrollments and increased educational opportunity. American colleges and universities grew from 67,350 male students in 1870, to a total enrollment of 156,756 in 1890, and to 355,215 by 1910.[35] The enforcement of compulsory public school laws and school certification programs sponsored by state colleges and universities permitted an increasing number of Americans to receive some form of higher education,

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[32] 7 U.S.C. § 322 (1952).

[33] J. S. Brubacher & W. Rudy, supra note 3, at 380.

[34] R. Hofstader & C. D. Hardy, supra note 1, at 160.

[35] Id. at 31.

with the result that by 1895, 41 percent of all students admitted to institutions of higher education in the United States were graduates of public high schools.[36]

The structure that accommodated the growth in higher education enrollment and served as the practical-oriented public institution was the state university as it developed in the American Midwest and West. Rudolph wrote,

> In the post-Civil War period, it became apparent that the American state university would be defined neither in the South, the first home of the state university movement, nor in the Northeast, where the old colonial institutions precluded its growth. . . . The emergence of western leadership in the movement stemmed in part from the remarkable rapidity with which western states were populated and from the accelerated speed with which their population grew.[37]

Historians identified the University of Michigan as the prototype state university in the post-Civil War period. Brubacher and Rudy called Ann Arbor "the most complete embodiment of the Jeffersonian ideal of higher education in the pioneer West."[38] William C. DeVane wrote that the University of Michigan served as a national example in its organization of the Michigan public education system.[39]

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[36] F. Rudolph, supra note 2, at 284.

[37] Id. at 277.

[38] J. S. Brubacher & W. Rudy, supra note 3, at 156.

[39] W. C. DeVane, Higher Education in Twentieth Century America 46 (1965).

Rudolph concluded that the University of Michigan was instrumental in defining the role of the state university, providing the leadership to bring about revision in curriculum and administrative arrangements in order to "establish the concept of unified system of free state education, on the European pattern, with the state university at the head of the system."[40] Michigan's 1837 charter was copied in the basic document establishing the University of Minnesota, and Hofstader and Hardy suggested that the Michigan charter form was a model in the drafting of the University of Wisconsin charter of 1848.[41]

The identity of the emerging American state university, as expressed by two late nineteenth century University of Michigan presidents, embodied a nonsectarian and democratic educational philosophy. Henry Philip Tappan, president of the university in the 1850's, provided a conceptualization of the true university.

> The University as an institution of the State, open to all the people of the State, and affording to them the means of the highest education, is a symbol of the essential union of all religious sects, and of all political parties. . . . Whatever may be our differences, we have a common agreement--a common interest in the great subject of education. It is part of wisdom to preserve the University intact from the questions on which we differ, and to maintain and foster it purely as an educational institution.[42]

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[40] F. Rudolph, supra note 2, at 278.

[41] R. Hofstader & C. D. Hardy, supra note 1, at 156.

[42] H. P. Tappan, "Idea of the True University" quoted in R. Hofstader and W. Smith (Eds.) American Higher Education: A Documentary History 543-544 (1961).

President James B. Angell, who followed Tappan at the University, argued for the extension of educational opportunity, asserting "We need all the intelligence, all the trained minds we can have."[43] Angell contended that he could not conceive of "anything more hateful, more repugnant to our natural instincts, more calamitous at once to learning and to the people, more unrepublican, more undemocratic, more unchristian than a system which should confine the priceless boon of higher education to the rich."[44]

The University of Michigan was originally established in 1817, but it was not to achieve national recognition until after the Civil War. In 1837, the institution was reorganized and placed under the dual control of a statutorily created board of regents and the state legislature. By 1840, a select committee of the Michigan Legislature inquired into the condition of the university and reported that the state university suffered from legislative interference in its operation.[45]

> The argument by which legislatures have hitherto convinced themselves that it was their duty to legislate universities to death is this: "It is a state institution, and we are the direct representatives of the people, and therefore it is expected of us; it is our right. The people

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[43] As quoted in F. Rudolph, supra note 2, at 279.

[44] Id. at 279-280.

[45] See Mich. H. R. Docs. of 1840, at 470.

> have an interest in this thing, and we must attend to it." As if, because a university belongs to the people, that were reason why it should be dosed to death for fear it would be sick, if left to be nursed, like other institutions, by its immediate guardians. Thus has state after state, in this American Union, endowed universities and then, by repeated contradictory and overlegislation, torn them to pieces with the same facility as they do the statute book, and for the same reason, because they have the right.[46]

To remedy the excesses of legislative interference the Michigan constitutional convention of 1850 succeeded in proposing the adoption of a new constitution which stipulated that "The Board of Regents shall have the general supervision of the University and direction and control of all expenditures from the University Interest Fund."[47] Forty-six years later, in assessing the intention of the constitutional convention which drafted the provision, the Michigan Supreme Court concluded that the framers "had in mind the idea of permanency of location, to place it [the university] beyond mere political influence, and to intrust it to those who should be directly responsible and amenable to the people."[48]

Between 1857 and 1912 more states provided either explicitly or by implication for some form of constitutional

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[46] Mich. H. R. Docs. of 1840, at 470.

[47] Mich. Const. of 1850, art. XIII, § 8.

[48] Sterling v. Bd. of Regents of Univ. of Mich., 110 Mich. 369 at 374, 68 N.W. 253 at 254 (1896).

status governance. Glenny and Dalglish referred to this movement as "the most significant legal development in the United States relating to institutional autonomy"[49] and contended that the movement's goal was to "remove questions of management, control, and supervision of the universities from the reach of politicians in state legislatures and governor's offices."[50]

The Michigan example, which made explicit constitutional reference to the supervision and control of the university by a board of regents, was followed in Nevada, Missouri, Colorado, Idaho, South Dakota, and Alabama. The 1864 Nevada Constitution required the legislature to "provide for the establishment of a State university, . . . to be controlled by a board of regents, whose duties shall be prescribed by Law."[51] Missouri stipulated that "The government of the State university shall be vested in a board of curators"[52] in its 1875 constitution. Colorado's 1876 constitutional document provided that "the board of regents shall have the general supervision of the university, and the exclusive control and direction of all the funds of,

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[49] L. A. Glenny & T. D. Dalglish, Public Universities, State Agencies and the Law: Constitutional Autonomy in Decline 14 (1973).

[50] Id. at 14-15

[51] Nev. Const. art. XI, § 4.

[52] Mo. Const. of 1875, art. XI, § 5.

and appropriations to, the university."[53] The Idaho Constitution of 1890 gave the Idaho Regents "general supervision of the University and control and direction of all funds . . . under such regulations as may be prescribed by law" and incorporated by reference all territorial powers of the regents in a provision perpetuating "rights, immunities, franchises, and endowments" previously granted.[54] South Dakota's 1890 constitution provided that "The state university, the agriculture college . . . and all other education institutions that may be sustained wholly or in part by the state shall be under the control of a board of five members appointed by the governor."[55] Alabama's 1901 constitution created a Board of Trustees for the state university and a Board of Trustees for the agricultural and mechanical college with the provision that each board would have the "management and control" of the respective institution.[56]

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[53] Colo. Const. art. IX, § 14.

[54] Idaho Const. art. IX, § 10.

[55] S.D. Const. art. XIV, § 3.

[56] Ala. Const. art. XIV, § 264.

In the states of Minnesota, California, Utah, and Oklahoma, constitutional provision made reference to pre-existing acts of incorporation that implied the autonomy of the respective state higher education institutions. Minnesota's constitution of 1857 stipulated that "all rights, immunities, franchises, and endowments heretofore granted or conferred are hereby perpetuated into said university."[57] The 1876 California constitution specified that "The University of California shall constitute a public trust" its organization and government to be perpetuated "by the organic act creating the same."[58] Utah's 1896 constitution was worded substantially the same as Minnesota's, with the addition of a clause confirming the existing laws which had previously established the university and the college of agriculture.[59] Oklahoma's constitution of 1907 specified that the State Board of Agriculture would be the Board of Regents for the agricultural and mechanical colleges and was constitutionally empowered with "such other duties . . . as may be provided by law."[60]

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[57] Minn. Const. art. VIII, § 4.

[58] Cal. Const. art. IX, § 9.

[59] Utah Const. art. X, § 4.

[60] Okla. Const. art. VI, § 31.

The Minnesota Supreme Court, in recognizing the autonomy of the Regents of the University of Minnesota, took cognizance that the territorial acts establishing the university created a body corporate with power to govern the institution and concluded,

> The Constitution added nothing to the quantity of the grant, but did add the new quality of perpetuity. . . . we find the people of the state, speaking through their Constitution, have invested the regents with a power of management of which no legislature may deprive them. . . . the whole executive power of the University having been put in the regents by the people, no part of it can be exercised or put elsewhere by the Legislature.[61]

Similarly, the California District Court of Appeal found that the effect of perpetuating the organization and government of the University of California in a manner consistent with the organic art of its incorporation was to elevate the university "to the place and dignity of a constitutional department of the body politic."[62]

The Oklahoma Supreme Court accepted the proposition that the framers of the Oklahoma constitution wrote and adopted the document in full cognizance of the supervisory powers possessed by the territorial board of regents of the

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[61]State v. Chase, 175 Minn. 259 at 266, 220 N.W. 951 at 954 (1928).

[62]Williams v. Wheeler, 23 Cal.App. 619 at 622, 138 P. 937 at 939 (Dist. Ct. App. 1913).

state agricultural and mechanical colleges. In the absence of a clause "perpetuating those powers, the court construed the phrase "shall discharge such other duties* * * as may be provided by law" [emphasis added] to incorporate the broad powers of the territorial board of regents.[63] The court's conclusion was that the duties, powers, and authority of the territorial board of regents became fixed and vested in the constitutionally established board of regents of the state agricultural and mechanical colleges from the time of adoption of the 1907 Oklahoma constitution. The court held

> In this case the specific duties of the board of regents were in no wise set out or enumerated by the Constitution, but they were defined by the statutes of the territory which are and were constitutional, and which in our judgment were the duties referred to by the convention and the people when they provided that the board of agriculture should be such board of regents, and made mention of the "other" duties which we have noticed.[64]

The purpose of providing constitutional status was articulated in early judicial decisions confirming constitutional autonomy for higher education institutions in the states of Michigan, Minnesota and California. Michigan's Supreme Court asserted that the constitutional convention's "intention was to place this institution [University of Michigan]

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[63] Trapp v. Cook Constr. Co., 24 Okla. 850 at 854, 105 P. 667 at 669 (1909).

[64] Id. at 861, 105 P. at 672.

in the direct and exclusive control of the people themselves, through a constitutional body elected by them."[65] A later Michigan Supreme Court decision took judicial notice of the university's excellence and concluded

> The progress which our university has made is due in large measure to the fact that the framers of the Constitution of 1850 wisely provided against legislative interference by placing its exclusive management in the hands of a constitutional board elected by the people. The underlying idea was that the best results would be attained by centering the responsibility in one body independent of the legislature, and answerable only to the people.[66]

Minnesota's supreme court determined that the purpose of the constitutional provision was

> to put the management of the greatest state educational institution beyond the dangers of vacillating policy, ill-formed or careless meddling and partisan ambition that would be possible in the case of management by either legislature or executive chosen at frequent intervals and for functions and because of qualities and activities vastly different from those which qualify for the management of an institution of higher education.[67]

The California District Court of Appeals concluded that

> it was the intention of the framers of the constitution to invest the board of regents with a larger degree of independence and discretion

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[65] Sterling v. Regents, 110 Mich. at 383, 68 N.W. at 258.

[66] St. Bd. of Agriculture v. State Administrative Bd., 226 Mich. 417 at 423, 424, 197 N.W. 160 (1924).

[67] State ex rel. Univ. of Minn. v. Chase, 175 Minn. 259 at 274, 275, 220 N.W. 951 at 957 (1928).

> in respect to these matters than is usually held to exist in such inferior boards and commissions as are solely the subjects of legislative creation and control.[68]

Higher Education in the Twentieth Century

Under the leadership of the growing state universities like those of Michigan, Minnesota, and California, American higher education experienced continuous growth from the late nineteenth century through the early 1970's. The popularization of opportunity for higher education was reflected by enrollments, which doubled every fifteen years from 1875 to 1950.[69] In 1900 only about 4 percent of the United States' college-age population attended college, yet after 1945 the proportion of college-age population attending college rose to one-half.[70] In 1870 colleges and universities enrolled approximately 50,000 students, yet by 1960 almost 3,500,000 attended higher education institutions and the 1960 figure doubled by 1970.[71] Student enrollment in

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[68]Williams v. Wheeler, 23 Cal.App. at 622, 138 P. 937 at 939.

[69]J. S. Brubacher & W. Rudy, supra note 3, at 400.

[70]R. O. Berdahl, Statewide Coordination of Higher Education 28 (1971).

[71]F. Rudolph, supra note 2, at 486.

public colleges and universities rose from 38 percent of all college enrollments at the turn of the century to 59 percent by 1960, and to 75 percent of total enrollments in 1975.[72]

Glenny wrote of the diversity and vitality of public higher education as it developed in the twentieth century.

> Universities began extensive research programs in the physical and biological sciences, provided new services for the farmers, industries and other special interest groups, added new professional schools in areas such as social work, public administration, industrial relations, and municipal management; further specialized in agriculture, medicine, and dentistry; and increased course offerings in almost all previously existing academic fields. Land grant colleges began to extend their programs into academic and professional disciplines which had traditionally been offered only by the state university.[73]

Growth in public higher education was reflected in state financial support. Appropriations of state tax funds for the operating expenses of higher education were estimated at 20,203,000 dollars in the 1909-1910 fiscal year, and had climbed to 1,389,271,000 dollars by fiscal 1959-1960.[74] In fiscal 1971-1972 total state appropriations for operating expenses had risen to 7,704,462,000 dollars.[75] Yet the percentage of total higher education income derived from state

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[72] M. M. Chambers, Keep Higher Education Moving 152 (1976).

[73] L. Glenny, Autonomy of Public Colleges 13 (1959).

[74] S. E. Harris, A Statistical Portrait of Higher Education 590 (1972).

[75] Council on State Governments, The Book of the States 1972-73 at 327 (1973).

and local government remained fairly constant, rising from 30 percent in 1910 to 31 percent in 1940 and declining to 27 percent by 1964.[76]

Along with the twentieth century growth of the state supported colleges and universities other state programs developed and expanded. State programs in agriculture, transportation, mental health, youth services, conservation, welfare and corrections placed substantial burdens on state revenues and created competition for state financial support.

Comprehensive reorganization plans and administrative policies designed to set constraints on spending were instituted by state government in order to control the rapid growth and increased complexity of state administrative agencies. Centralized administrative practices, exemplified by strong executive budget powers instituted in 1917 by Illinois Governor Frank Lowden, became typical of state government operations by the 1950s.[77] Berdahl noted that states instituted "Hoover Commissions" to restructure state administrative operations, and these commissions "recommended, among other things, a stronger governor's office, which

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[76] S. E. Harris, supra note 74, at 592.

[77] M. Moos & F. E. Rourke, The Campus and the State (1959).

could use the executive budget as a chief tool for arranging various state programs into some set of priorities.[78]

The impact of state administrative controls on the management of state colleges and universities was a subject of study by the Eisenhower Committee on Government and Higher Education. The committee's report, published in 1959, noted that the "intervention of state agencies into ostensibly nonacademic areas can quickly penetrate to educational policy."[79] Coming at a time when the zeal to reorganize state government was particularly strong, the report emphasized the unique status of American higher education and concluded that protecting the authority of lay governing boards from interference by state agencies was vital to the preservation of intellectual freedom.[80] A companion publication, The Campus and the State, cited examples of the debilitating impact of state administrative controls on the public and private sectors of American higher education and further underscored the need for safeguards to protect the independence of the college and university.[81] In the conclusion of The Campus and the State the authors wrote

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[78]R. O. Berdahl, supra note 70, at 29.

[79]Committee on Government and Higher Education, The Efficiency of Freedom 7 (1959).

[80]Id. at 6.

[81]See M. Moos & F. Rourke, supra note 77.

> However petty each instance of control may be, in cumulative effect a broad range of restrictions upon the operating freedom of institutions of higher education leaves very little room for imagination and vitality by which truly creative institutions of higher learning are nourished.[82]

Evidence that states recognize the need for a greater degree of autonomy for higher education than for other agencies of the state was manifested in provisions which provided constituional status for higher education in North Dakota, Louisiana, Mississippi, Georgia, Hawaii, Alaska, and Montana. The 1939 amendment to North Dakota's constitution provided for a board "created for the control and administration" of higher education.[83] The Louisiana State University was placed under the "direction, control, supervision, and management" of an incorporated board established by the 1940 constitution.[84] Mississippi's constitution established a board of trustees for "management and control" of state higher education institutions.[85] Georgia's 1945 revision of the constitution granted "government, control, and management" power to the university governing board.[86]

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[82] M. Moos & F. Rourke, supra note 77, at 323.

[83] N.D. Const. art. 54, § 1.

[84] La. Const. of 1940, art. VII, § 7.

[85] Miss. Const. art. VIII, § 213-A.

[86] Ga. Const. art. VIII, § 2-67.

Hawaii and Alaska incorporated constitutional provisions which required that the respective board of regents would have power to make policy as corporate bodies, and control funds entrusted to the state university system.[87] In 1972, Montana's constitution was revised to include a board of regents vested with the government and control of higher education "which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system.[88]

A survey of state constitutions discloses additional states which provide some form of constitutional recognition for public higher education. Twelve states have constitutional provisions requiring the legislature to prescribe laws for the governance of a higher education system.[89] Other states have constitutional provisions which indirectly refer to higher education in relation to public debt and higher education student loans [Ohio], finance of internal improvements [Oregon], encouraging legislature to

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[87] See Hawaii Const. art. IX, § 4 & Alaska Const. art. VII, § 3.

[88] Mont. Const. art. X, § 9.

[89] These states include Arizona (1910), Connecticut (1965), Florida (1968), Iowa (1857), Kansas (1861), Nebraska (1875), New Mexico (1950), New York (1895), North Carolina (1971), Texas (1876), Wisconsin (1848), and Wyoming (1890).

pass laws in favor of colleges and universities [Tennessee], and encouraging colleges [Maine]. Only one state, New Jersey, drafted a constitution in this century that made no provision for a higher education system.[90]

A governmental framework designed to permit higher education independence in selected areas has been of particular concern in the 1970s. State participation in the evolution of higher education policy is a reality which necessarily attaches to state financial support, and the economic climate of this decade has forced continued and increased reliance upon state government to provide financial support for American higher education in both the public and private sector.[91] Berdahl has argued for a "suitably sensitive mechanism" allowing state participation in the evolution of higher education policies, but denying policy making "as an incidental result of administrative controls being applied by persons only modestly conversant with the special problems of higher education."[92] John Corson articulated a similar position in reference to the governance of higher education in the 1970s.

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[90]Gove & Welch, "The Influence of State Constitutional Conventions on the Future of Higher Education," 24 Educ. Rec. 207 (Spring, 1969).

[91]See E. Cheit, The New Depression in Higher Education 137-156 (1971).

[92]R. O. Berdahl, supra note 70, at 12.

> It is clear that the general public, various interest groups (e.g. teachers, blacks, farmers, businessmen), and state and federal officials outside the academic community as well as trustees, administrators, faculty members, and students within, have legitimate interests in college and university decision making. What is needed, given that intermixture of interests, is a framework that will satisfy the legitimate interests and responsibilities of each.[93]

A 1971 report of the Carnegie Commission on Higher Education found that forty states confer corporate powers on their higher education boards and permit those boards wide latitude in educational policy making, fund disbursement, direct borrowing and control over academic personnel.[94] The report noted that the authority given to these boards indicates that states recognize the unique status of their higher education system, but concluded that the indirect controls exercised by centralized purchasing, state civil service, and budgetary or comptrolling agencies represent encroachments upon the traditional independence of the higher education system.[95]

In 1973, the Carnegie Commission reinforced its earlier expression of concern about controls exercised by state government over public and private higher education,

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[93] J. J. Corson, The Governance of Colleges and Universities 58 (1975).

[94] Carnegie Commission on Higher Education, The Capitol and the Campus 100 (1971).

[95] Id. at 100-101.

and made reasonable independence from state government a priority issue for American higher education.[96] The Commission report cited the evolution of American higher education from sectarian to secular purposes; noted the massive growth of higher education institutions, particularly in the public sector; and emphasized the value of higher education in contributing to problem solving in technological society.[97] While recognizing the dependence of all higher education on state financial resources, the report concluded that higher education should be substantially self-governing and its administrative arrangements, academic affairs, and intellectual conduct.[98]

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[96] Carnegie Commission on Higher Education, Governance of Higher Education: Six Priority Problems 19 (1973).

[97] Id. at 20-21.

[98] Id. at 22.

CHAPTER THREE

AUTONOMY AMONG CONSTITUTIONAL STATUS HIGHER EDUCATION SYSTEMS

The history of American colleges and universities, and the twentieth century concern for the preservation of a reasonable degree of higher education independence from state government interference, suggest that complete autonomy is not the goal of state systems of higher education. The need for a suitable mechanism to insure reasonable autonomy on selected issues of college and university governance implies a legal structure, supported by case law, that confirms certain powers and duties in a higher education governing body which cannot be withdrawn or denied at the whim of another branch or department of state government. The value which can be ascribed to a state university system's constitutional status has been a subject of debate,[1] but a large body of judicial precedent has developed in support of the principle that university systems which possess constitutional status

[1] Compare Louisell, "Responding to the December 8th Resolution of Politics, Free Speech and Due Process," with Linde, "Campus Law: Berkeley Viewed from Eugene" 54 Calif. L. Rev. 40 at 63 & 107 at 114.

exercise greater autonomy over exclusively university affairs than do legislatively created systems.

A constitutional provision vesting power over a higher education system in a governing board establishes the constitutional status of the higher education system, but such a provision does not confirm that system's autonomy. "Constitutional status" refers only to the presence or absence of a constitutional provision mandating a higher education system and specifying the powers vested in that system's governing board or boards. "Constitutional autonomy" refers to the degree of control exercised by the higher education governing board in relation to external state governmental entities. The precise degree of constitutional autonomy available to the higher education governing board can only be determined by examining the case law interpreting the constitutional status of the state higher education system.

An assessment of the meaning to be ascribed to the legal concept of constitutionally autonomous higher education must reconcile varying judicial interpretations. State constitutional provisions granting constitutional status have not been uniform in wording, and state courts have not applied a single standard in interpreting these constitutional provisions. Higher education systems which appear to possess constitutional autonomy may be restricted by the precise wording of the provision granting constitutional

status. Other provisions of the state constitution may limit or void a specific grant of autonomy. Finally, judicial notice of a history of administrative and political practice may annul a constitutional provision which might appear to place the state's higher education system among those judicially held to be constitutionally autonomous.

In the absence of a precise test predicting the interpretation a state court will give to a constitutional provision vesting powers in a higher education governing board, a state by state analysis of judicial decisions relative to the autonomy of each state's system of higher education is appropriate. For purposes of analysis the constitutions of all fifty states were examined and those states which appear to grant some measure of constitutional status to the higher education governing body were divided into three categories. The first category includes those states which appear to grant unrestricted constitutional authority to the governing board for higher education. The second category includes those states which appear to grant constitutional authority, but for the reservation to the state legislature of limited powers to prescribe regulations or specify the duties of the governing body or bodies within the higher education system. The third category includes those state constitutions which mandate the creation of a state

higher education system and place power in a governing body to manage or administer the state system subject, however, to the broad power of the legislature to make laws regarding higher education.

Constitutional Status: Unrestricted Grants of Power

The constitutions of ten states appear to grant unrestricted power of management and control over the state higher education system to a governing board or boards. Administrative arrangements for the control of higher education among these ten states ranges from Michigan, whose constitution provides for autonomous governing boards for each institution within the state system, to Georgia, which has a single governing board consolidating all higher education in the state. Arrayed between these two systems are states like Louisiana and Oklahoma, each of which maintains institutional governing boards for major state colleges and universities and a state-wide coordinating board for all state higher education.

Judicial recognition of the constitutional status of each state's higher education system presents an equally diverse array of legal interpretations. Michigan, Minnesota and Oklahoma provide a relatively large body of case law which consistently acknowledges the autonomy of the higher

education system. Montana, Georgia and Louisiana courts have established that the higher education system in each of these states is autonomous, but the absence of a large body of case law makes assessment of the precise degree of autonomy available to these higher education systems difficult to discern. Alabama and North Dakota courts have not yet recognized the autonomy of the higher education system in their respective states, although court decisions have recognized the authority of the higher education governing board(s) where statutory and constitutional powers have been complimentary. Finally, courts in the states of Utah and Missouri, despite constitutional language to the contrary, have held that the respective university systems do not possess constitutional autonomy as that doctrine has been defined in the jurisdictions of Michigan and Minnesota.

Michigan

The Michigan Constitution of 1963 established constitutionally autonomous governing boards for each of the state higher education and postsecondary education institutions. The provisions granting autonomy are substantially the same as the provisions establishing the University of Michigan's autonomous status under the Michigan Constitution of 1850 and the Michigan Constitution of 1908. Each institutional

governing board has the "general supervision of its institution and the control and direction of all expenditures from the institution's funds."[1] In addition, the constitution specifies that the "legislature shall appropriate moneys to maintain" the institutions and shall receive "an annual accounting of all income and expenditures by each of these educational institutions."[2]

There is little doubt that the state of Michigan has most fully developed the concept of constitutionally autonomous higher education. The landmark decision asserting the legal concept is Sterling v. Board of Regents of the University of Michigan,[3] which involved a mandamus action to compel the University of Michigan Regents [hereinafter "Regents"] to remove the homeopathic medicine college to Detroit in compliance with legislative statute. In Sterling the Michigan Supreme Court examined the constitutional provision granting autonomy to the University of Michigan, and determined that the provision effectively made the Regents the only body in which the constitution reposed general supervisory power without an express power to control or define

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[1] Mich. Const. art. 8, § 5.

[2] Id. § 4.

[3] 110 Mich. 369, 68 N.W. 253 (1896).

duties reserved to the legislature. The court held that the legislature was without authority to enforce the removal of the homeopathic medicine college because the constitution conferred exclusive management of the university upon the Regents.

The decision in Sterling was based upon four principle factors. First, the meaning of the constitutional provision granting autonomy to the Regents was buttressed by examination of the constitutional convention debate on the provision. Second, the entire Michigan Constitution of 1850 was examined, no provision of which was held to express any limitation or restriction on the exclusive grant of power to the Regents. Third, the existing case law tended to support the powers of the Regents, particularly the case of Weinberg v. Regents of the University of Michigan[4] which held that the Regents were exempt from state statute requiring payment of a contractor's bond because of their status as a constitutional corporation. Fourth, the court took judicial notice that the Regents had exercised general supervision over the university for forty-six years and had openly asserted the constitutional right to exclusive control

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[4]97 Mich. 246, 56 N.W. 605 (1893).

and management of the institution.[5] Each of the above factors converged on the holding that

> The board of regents and the legislature derive their power from the same supreme authority, namely, the constitution. In so far as the powers of each are defined by that instrument, limitations are imposed, and a direct power conferred on one necessarily excludes its existence in the other, in the absence of language showing a contrary intent. . . . They are separate and distinct constitutional bodies with the powers of the regents defined. By no rule of construction can it be held that either can encroach upon or exercise the powers conferred upon the other.[6]

The Regents of the University of Michigan later relied on Sterling in an action for mandamus to compel the state Auditor-General to draw warrants on the State Treasurer in order that the Regents might pay the travel expenditures of university representatives. The Auditor-General contended that the general accounting laws of the state were applicable to monies appropriated by the legislature for the use and maintenance of the university. If this proposition were accepted, the Auditor-General's judgment would determine what expenditures were for the use and maintenance of the university. In Regents of the University

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[5] Cf. Auditor General v. Regents of the Univ., Mich. 467, 47 N.W. 440 (1890); People v. Regents of the Univ. of Mich., 18 Mich. 468 (1869); and People ex rel. Drake v. Regents of the Univ. of Mich., 4 Mich. 98 (1856). Each of these cases reflect the Regent's assertion of exclusive control and management of the University of Michigan.

[6] 110 Mich. at 382, 68 N.W. at 257.

of Michigan v. Auditor-General[7] the Michigan Supreme Court examined the constitutional provision granting autonomy to the university, and noted that the Michigan Constitution of 1908 expanded the Regent's control to all expenditures of university funds.[8] The court recognized the Regents as "a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature."[9] Despite the acquiescence of the Regents in submitting the warrants for the Auditor-General's transmittal to the State Treasurer, the denial of the warrants did not conform to the public policy developed over the half-century of autonomous higher education existent in Michigan. Consequently, the court held that the state's general accounting laws did not apply to the expenditure of funds under the exclusive control of the Regents and the duties of the Auditor-General were purely ministerial, permitting no discretion in complying with decisions of the Regents.

In a related series of decisions the Michigan Supreme Court established the constitutional autonomy of the State

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[7]167 Mich. 444, 132 N.W. 1037 (1911).

[8]Cf. Mich. Const. of 1850, art. VIII, § 13 and Mich. Const. of 1908, art XI, § 5. The 1908 constitution changed the phrase providing that the Regents had "direction and control of all expenditures from the university interest fund" and substituted "direction and control of all expenditures from the university funds."

[9]167 Mich. at 450, 132 N.W.2d at 1040.

Board of Agriculture acting as Regents for the Michigan agriculture and mechanical colleges [hereinafter "A & M Regents"]. In Bauer v. State Board of Agriculture[10] the high court ruled the constitutional status of the A & M Regents analogous to that of the University of Michigan Regents. Relying on Sterling the court concluded that constitutional status permitted broad discretion to the A & M Regents, thus specific statutory authority to contract for services consistent with the general purposes of the agricultural college was unnecessary. Following Bauer, the Michigan Supreme Court compelled the Auditor-General to draw warrants in excess of the statutory limit established for the agriculture college's mechanical and engineering department on the ground that legislative attempts to set maximum limits on the expenditure of federal grants intended for use by the college violated the constitutional authority of the A & M Regents to control college funds.[11] In a later case, the court excluded the A & M Regents from the application of the state workmen's compensation law, concluding

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[10] 164 Mich. 415, 129 N.W. 713 (1911).

[11] State Bd. of Agriculture v. Fuller, 180 Mich. 349, 147 N.W. 341 (1914).

that an employee of the agriculture college was not an employee of the state within the meaning of the statute.[12]

The status of a constitutional corporation was at issue in two decisions that followed the development of the doctrine of constitutional autonomy in Michigan. The Michigan Supreme Court was forced to reconcile the university's independence from other branches of state government with the doctrines of eminent domain and sovereign immunity. In an appeal of condemnation proceedings authorized by law, the Michigan Supreme Court held that the state had inherent power to hold title for the constitutionally autonomous university since the mere holding of title without the right to sell, manage, or control the university property would not result in interference with the powers of the Regents.[13] A later ruling stipulated that autonomous status did not preclude the Regents from application of the doctrine of immunity from tort liability; the university remained a state instrumentality devoted to a public purpose.[14]

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[12]Alger v. Mich. Agriculture College, 181 Mich. 559, 148 N.W. 341 (1914).

[13]People, for Use of the Regents of Univ. of Mich. v. Brooks, 224 Mich. 45, 194 N.W. 602 (1923).

[14]Robinson v. Washtenaw Circuit Judge, 228 Mich. 225, 199 N.W. 618 (1924).

In early 1924, at the same time the Michigan courts were reconciling the status of the higher education system, a watershed decision dealing with the relationship between the A & M Regents and the Michigan State Administrative Board [hereinafter "Administrative Board"] was handed down by the Michigan Supreme Court. The Board of Agriculture, acting as the A & M Regents, sought to compel the Administrative Board to grant legislative appropriations enacted for the agricultural extension program of the college. The legislature's attempt to delegate general supervisory control over the college appropriation to the Administrative Board was deemed to be an unconstitutional invasion of the A & M Regent's powers in State Board of Agriculture v. State Administrative Board.[15] Two constitutional provisos were considered by the court in making the decision: Michigan Constitution of 1908, article II, § 10 provided a mandate requiring the legislature to make appropriations on behalf of the colleges, and the constitutional status of the university to control the expenditure of funds on behalf of the college was enunciated under § 7 and § 8 of the same article. Taking cognizance of the history of the legislature's support for Michigan higher education, the court

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[15] 226 Mich. 417, 197 N.W. 160 (1924).

reasoned that the main purpose of the legislation was to provide financial support for the college extension program, while the policy of placing supervisory control in the Administrative Board was deemed incidental to the main legislative purpose. In a five to four decision the court majority took the position that a legislative condition violative of the constitutional powers of the A & M Regents could not be used to deny the A & M Regents control and management of the appropriation. The condition placing supervisory control in the Administrative Board was declared to be unconstitutional, but the appropriation to the college was not nullified.

The impact of the decision in State Board of Agriculture v. State Administrative Board dealt directly with the powers of centralized administrative boards in relation to the state higher education system, and limited the Michigan Administrative Board at a time when these agencies were delegated substantial powers over state government operations. In addition, the court's decision to let the appropriation to the extension program stand limited the power of the Michigan Legislature to intervene in educational policy-making by substituting the judgment of an external administrative agency for the supervision, control, and management of the higher education governing board.

The subsequent history of the doctrine of constitutionally autonomous higher education in Michigan has emphasized exceptions to the doctrine based on statutes providing for the general welfare and enacted under the state's police power. The demise of sovereign immunity in Michigan was heralded by two Michigan decisions, the first of which upheld the constitutional authority of the University of Michigan Regents to purchase liability insurance while permitting the plaintiff discovery of the policy for purposes of pleading the Regent's waiver of immunity.[16] The second decision on immunity suggested a more pervasive theme by affirming the authority of the Regents to manage operation and control allocation of university funds, yet ruling that legislation waiving sovereign immunity was an established public policy of the people of Michigan which would apply to the Regent's despite their status as an "independent branch of government."[17] Other decisions have had the effect of holding Michigan's workmen's compensation law and public employee relations act applicable to the college and university

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[16]Christie v. Bd. of Regents of the Univ. of Mich., 364 Mich. 202, 111 N.W.2d 30 (1961).

[17]Branum v. State, 5 Mich App. 134, 145 N.W.2d 860 (Ct. App. 1966). See also Glass v. Dudley Paper Co., 365 Mich. 227, 112 N.W.2d 489 (1962) establishing legislature's constitutional authority to fix jurisdiction of inferior courts to hear tort claims against the A & M Regents.

governing boards. In a review of a Workmen's Compensation Commission order denying the A & M Regents' motion to dismiss plaintiff's application for hearing, the supreme court divided evenly on whether or not the A & M Regents were subject to the provisions of the Workmen's Compensation Act; thus the Commission's order to remand plaintiff's case for a hearing on the merits was affirmed.[18] In the area of employee relations, the Michigan Supreme Court has recognized the university Regents as a "unique public employer," with exclusive control over matters dealing with the education of students, concluding that "Some conditions of employment may not be subject to collective bargaining because those particular facets of employment would interfere with the autonomy of the Regents."[19]

Where the public policy of the state of Michigan was not manifest in the legislature's police power to enact laws on behalf of the general welfare, the governing boards of state colleges and universities have prevailed in several instances. Michigan courts have held that a legislative

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[18]Peters v. Mich. State College, 320 Mich. 243, 30 N.W.2d 854 (1948).

[19]Regents of the Univ. of Mich. v. Mich. Employment Relations Comm'n., 389 Mich. 96, 204 N.W.2d 218, 224 (1973). See also Bd. of Control of Mich. Univ. v. Labor Mediation Bd., 384 Mich. 561, 184 N.W.2d 921 (1971) and Regents of the Univ. of Mich. v. Labor Mediation Bd., 18 Mich. App. 485, 171 N.W.2d 477 (Ct. App. 1969).

enactment authorizing the University of Michigan Regents to contract for fire and police protection cannot serve as a basis for compelling the Regents to enter into such a contract.[20] Nor would the Regents require legislative approval to make voluntary payments to a school district out of student housing rental receipts.[21] In addition, residency requirements for tuition purposes are a matter for Regent rather than legislative determination[22] as is the setting of tuition rates where the rate is in excess of a legislatively prescribed schedule.[23]

In 1975 the Michigan Supreme Court was asked to discriminate the distribution and scope of powers among and between the state legislature, the governing boards of the universities, and the State Board of Education. The University of Michigan Regents brought suit for declaratory relief, arguing that legislative acts conditioning appropriations to the universities were unconstitutional, and the State Board of Education intervened as a defendant in an attempt to establish that a constitutional provision

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[20]Lucking v. People, 320 Mich. 495, 31 N.W.2d 707 (1948).

[21]Sprik v. Regents of Univ. of Mich., 43 Mich. App. 178, 204 N.W.2d 72 (Ct. App. 1972).

[22]Schmidt v. Regents of Univ. of Mich., 63 Mich. App. 54, 233 N.W.2d 855 (Ct. App. 1975).

[23]Kowalski v. Bd. of Trustees of Macomb County Community College, 67 Mich. App. 74, 240 N.W.2d 273 (Ct. App. 1976).

requiring the State Board of Education to "serve as the general planning and coordinating body for all public education"[24] was authority for requiring prior approval of all state university programs. In Regents of the University of Michigan v. State[25] the court held that a change in the language of the appropriation act, substituting the phrase "[I]t is legislative intent" for "[I]t is a condition of this appropriation" made the issue of constitutional interference with the supervisory powers of the Regents moot. In addition, the court determined that a legislative enactment requiring the universities to submit schedules for debt liquidation was a reasonable reporting measure and not a legislative attempt to exercise supervision or control over the universities. In defining the authority of the State Board of Education the court stated

> It is our opinion that the Universities must inform the Board of proposed new programs and the estimated financial requirements for each. . . . We interpret "approval" as meaning only advice to the legislature and to the Universities. This advice relates to the overall planning and coordinating function of the board and in no way carries with it the power to veto the proposed programs. . . . In other words, the Board is advisory in nature.[26]

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[24] Mich. Const. art. VIII, § 3.

[25] 395 Mich. 52, 235 N.W.2d 1 (1975).

[26] Id. at 75, 235 N.W.2d at 11.

The decision in Regents of the University v. State clarified the relationship between the State Board of Education, as a constitutionally established advisory board, and the various constitutionally autonomous institutions of higher education. However, the court avoided resolution of the relationship between the legislature's power to condition appropriations and the university's power to supervise and control expenditure of university funds. In a dissenting opinion Justice Williams focused upon the following language of the appropriation bill: "Funds appropriated herein to each institution of higher education may not be used to pay for the construction, maintenance or operation of any self-liquidating projects."[27] The dissent reasoned that the appropriation created a prohibitory condition which unconstitutionally restricted the powers of the Regents. In addition to interfering with the power of the Regents to manage and control funds, the use of such a prohibition in a general fund appropriation [as opposed to a specific appropriation] denied the Regents the management decision to refuse the appropriation or accept the appropriation and honor the condition.

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[27] 1977 Mich. Pub. Acts 122, § 20.

The Regents' option to accept or reject specific legislative appropriations had been argued in previous Michigan decision as a basis for sustaining the imposition of legislative conditions attached to specific appropriations.[28] While the legislature may not interfere with the management of the higher education institution, the Regents' decision to accept or reject a specific legislative appropriation placed management control in the Regents. The majority decision in Regents of the University v. State abstained from deciding the constitutionality of the condition until a refusal to comply with the condition or legislative action to force compliance occurred. This result obscured the relationship between the legislative power of appropriation and the Regents' power to supervise and control the funds of an autonomous university.

Minnesota

The territorial act establishing the University of Minnesota suggested the legislative intent to create a corporation by the title "An act to incorporate the University of Minnesota at the Falls of St. Anthony."[29]

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[28] See State Bd. of Agriculture v. State Administrative Bd., 226 Mich. 417, at 424-425, 197 N.W. 160, at 161 (1924).

[29] Laws of the Territory of Minnesota, Ch 3 (1851).

The act declared that government of the university be vested in a twelve member Board of Regents elected by the legislature and empowered "to enact laws for the government of the university" as a "body corporate."[30] By Minnesota's constitution of 1857, article 8, § 4[31] all the rights, immunities, franchises, and endowments conferred were perpetuated in the university.

Early decisions involving the Regents of the University of Minnesota [hereinafter "Minnesota Regents"] established that the government of the university, as to matters of education, was exclusively vested in the Minnesota Regents,[32] and that the Minnesota Regents were perpetuated as a public institution by the Minnesota Constitution of 1857.[33]

The first in a series of decisions articulating the constitutional autonomy of the Minnesota Regents was State ex rel. University of Minnesota v. Chase,[34] a mandamus action to compel the State Auditor to reimburse costs of a survey which preceded the installation of a group life insurance plan at the university. The auditor's refusal

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[30] Laws of the Territory of Minnesota Ch. 3, § 9 (1851).

[31] This provision became Art. 13, § 2 in the restructured Minn. Const. of 1974.

[32] Gleason v. Univ. of Minn., 104 Minn. 359, 116 N.W. 650 (1908).

[33] Knapp v. State, 125 Minn. 194, 145 N.W. 967 (1914).

[34] 175 Minn. 259, 220 N.W. 951 (1928).

to pay the expense was based upon a State Finance Commission ruling disapproving expenditures for the survey. The commission claimed authority to supervise and control the expenditure of university funds under a Minnesota statute centralizing administrative responsibility in the governor. Minnesota's Supreme Court examined both the constitutional provision perpetuating the rights, immunities, franchises and endowments of the university and the territorial acts which had provided for the governance of the university system, and concluded that the university constituted a constitutional corporation which vested the Minnesota Regents with the exclusive power of university management. After reviewing legal precedent establishing the authority of autonomous higher education systems in Michigan, Oklahoma, and Idaho, the court affirmed the mandamus order and analogized the legal status of the Minnesota Regents with that of a private corporate entity.

> Of that corporation the regents were both the sole members and the governing board. They were the corporation in which were perpetuated the things covered by the constitutional confirmation. The language has a definite legal import; the terms are those of confirmation in perpetuity of a prior grant of corporate rights. So the university, in respect to its corporate status and government, was put beyond the power of the Legislature by paramount law, the right to amend or repeal which exists only in the people themselves.[35]

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[35] 175 Minn. at 265, 220 N.W. at 953.

Other decisions have continued to affirm the status of the Minnesota Regents elaborated in Chase. In Fanning v. University of Minnesota[36] the power to govern was held to imply the power to construct dormitories where the credit of the state is not pledged. The Supreme Court ruled that the constitutional powers of the Minnesota Regents were not subject to legislative or executive control, "nor can the courts at the suit of a taxpayer interfere with the [Regents] while governing the university in the exercise of its granted powers."[37]

The Minnesota Supreme Court considered the powers of the Regents in State ex rel. Peterson v. Quinlivan[38] and again affirmed the general franchise of independent corporate status implemented by the constitution and the territorial statutes establishing the university's governance. Noting that the territorial assembly legislated the number, terms, and powers of the Minnesota Regents, the court held unconstitutional an act of the 1927 Minnesota Legislature which sought to enlarge the number of regents and vest power to appoint regents in the governor. With regard to the argument that the state constitution provided for executive appointment of all state officers, the court concluded that the

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[36] 183 Minn. 222, 236 N.W. 217 (1931).

[37] Id. at 225, 236 N.W. at 219. Accord Bailey v. Univ. of Minn., 290 Minn. 359, 187 N.W.2d 702 (1971).

[38] 198 Minn. 65, 268 N.W. 858 (1936).

administration of the university was removed from the field covered in the general law governing appointments by the constitutional grant of exclusive powers to the Minnesota Regents.

In response to a private citizen's petition for mandamus to compel the Regents to adopt prohibitions on the teaching or dissemination of sectarian religious doctrines, the supreme court again acknowledged the exclusive powers of the Minnesota Regents. The holding in State ex rel. Sholes v. University of Minnesota[39] required that petitioner first seek relief from the Minnesota Regents before proceeding in court. The decision was based upon analogies with the administrative law doctrine of primary jurisdiction, modified in application to a constitutional corporation. The court quoted liberally from the California case of Wall v. Board of Regents[40] in support of its position, distinguishing the Minnesota Regents from an administrative agency in the following terms.

> The board of regents of our university . . . is a body corporate, created by our constitution and endowed by it with the power to govern the institution which it controls, free from interference by either legislature or the courts so long as it

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[39]236 Minn. 452, 54 N.W.2d 122 (1952).

[40]38 Cal. App. 2d 698, 102 P.2d 533 (Dist. Ct. App. 1913).

> stays within the scope of its constitutional powers. An administrative agency, on the other hand, is given life by the legislature. . . . Its powers may be curtailed or enlarged by legislative action. The legislature has no such power over the board of regents of our university. Its charter may be amended only by action of the people.[41]

Missouri

Missouri's 1865 constitution required the legislature to "establish and maintain a state university"[42] a pronouncement that was enlarged upon in the 1875 constitution's mandate vesting "government of the university in a board of curators."[43] The unrestricted power to govern would appear to vest the Board of Curators of the University of Missouri [hereinafter "Missouri Curators"] with a large measure of autonomous control over the operation of the university, but judicial interpretation of the constitutional mandate has not sustained this presumption.

The meaning of the term "government" was construed by the Missouri Supreme Court in a manner which denied the Missouri Curators constitutional autonomy. The leading decision is State ex rel. Heimberger v. Board of Curators,[44]

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[41] 236 Minn. at 456-457, 54 N.W.2d at 126.

[42] Mo. Const. of 1865, art. IX, § 4.

[43] Mo. Const. of 1875, art. XI, § 4.

[44] 268 Mo. 598, 188 S.W. 128 (1916).

which was an action to compel the Missouri Curators to comply with a legislative enactment establishing specified courses and professional degrees at particular colleges. The Missouri Curators contended that the constitutional provision granting university governance deprived the legislature of authority over university system internal affairs, thus a law which interfered with the scope of powers granted to the curators was unconstitutional and void. The court declined to interpret "government" in such a way as to limit legislative authority over the university, noting that the Missouri Curators had "rendered obedience"[45] to previous acts of the Missouri General Assembly for a period of fifty years.

The 1945 Missouri Constitution provided for separate higher education provisions; one which vested the "government" of the state university in the Missouri Curators and the other mandating the legislature to "adequately maintain the state university and such other educational institutions as it may deem necessary."[46] While the decision in Heimberger identifies the Missouri Curators as subsumed to the legislature,

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[45] 268 Mo. at 617, 188 S.W. at 133.

[46] Mo. Const. art. IX, §§ 9(a), 2(b).

the Missouri courts have extended the power of the Missouri Curators under the 1945 constitution by implying the power to issue revenue bonds in the absence of legislative authorization.[47] However, in a recent case in which the Missouri Curators challenged the statutory jurisdiction of the State Board of Mediation to determine appropriate bargaining units and majority representative status, the court sustained its narrow interpretation of "government" by holding the public sector labor law applicable to certain non-academic university employees and ruling that the effect of the law did not encroach the Missouri Curators' right to govern the university.[48]

Missouri's higher education system, which appeared to possess constitutional independence, was severely restricted in its authority by the decision in Heimberger, a decision which was later incorporated within the restrictions articulated in the 1945 constitutional provisions on Missouri higher education. The import of Heimberger is that constitutional status, absent judicial confirmation, is insufficient to guarantee the independence of a state university system from external state government control.

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[47]State ex rel. Curators of Univ. of Mo. v. McReynolds, 354 Mo. 1199, 193 S.W.2d 611 (1946).

[48]Curators of the Univ. of Mo. v. Public Service Employee's Local No. 45, 520 S.W.2d 54 (Mo. 1975).

Utah

Utah's constitution incorporated the pre-existing statutes of the territorial government in the provision for higher education. Despite the similarity between the Utah provisions and those of Minnesota, the Board of Trustees of the University of Utah [hereinafter "Utah Trustees"] was denied constitutional autonomy by decisions of the Utah Supreme Court.

A distinction between the territorial laws establishing the Utah college of agriculture and the "organic laws" perpetuated in the constitutions of California, Idaho and Minnesota focused on the unincorporated status of the college. In Spence v. Utah State Agriculture College[49] the supreme court held the agriculture college to be an arm of the state subject to legislative acts altering the composition of the governing board and to legislative authorization to issue revenue bonds. In arriving at its decision the court took judicial notice of the history of Utah higher education's compliance with legislative enactments and declined to rule on substantive issues of constitutional status introduced in an amicus curiae brief filed by the Utah Trustees.

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[49] 119 Utah 104, 225 P.2d 18 (1950).

Six years later the University of Utah sought a declaratory judgment defining its status under the Utah Constitution. The trial court accepted the proposition that the university was constitutionally autonomous and declared legislative acts requiring preaudit of accounts and deposit of funds with the State Treasury to be unconstitutional. On appeal, the Utah Supreme Court reversed the lower court decision.[50] In likening constitutional autonomy to the status of an independent province rather than a fourth branch of government, the Court expressed concern that judicial confirmation of such a status would void all restraints upon university expenditure, giving the Utah Trustees power to destroy the state's solvency and subvert constitutional provisions on limitation of debt and legislative control over appropriations. The court distinguished constitutional provisions granting autonomy to the Minnesota and Idaho higher education systems on the ground that these states vested more extensive powers in their governing boards than did the Utah Constitution and territorial laws. The court noted that Idaho's constitution vested supervision of the university and direction and control of university funds and appropriations in the governing board while Minnesota's

[50]Univ. of Utah v. Bd. of Examiners, 4 Utah 2d 408, 295 P.2d 348 (1956).

constitution placed control of all federal lands conveyed for the benefit of the University of Minnesota in the Minnesota Regents. In contrast, Utah's constitution granted the Utah Trustees no power to control or direct university financial resources. Other factors appeared to influence the court's decision. The territorial legislature had established the University of Utah as a public corporation, but had made the institution subject to laws relating to the university's purposes and government. In addition, the Utah Trustees had conformed to legislative acts involving the university for over seventy years since adoption of the constitutional provision.

The premise in University of Utah v. Board of Examiners was that constitutional autonomy might create an "independent province" beyond the control of state government. This assertion has been attacked by one commentator because it ignores decisions in other states which have construed their constitutions as granting a high degree of independence without treating the university system as an unrestrained entity.[51] Another commentator has suggested that the strategy of requesting a broad, general declaratory

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[51]"State Universities--Legislative Control of a Constitutional Corporation," 55 Mich. L. Rev. 728 (1957).

judgment from the court was unwise, and that the Utah Trustees should have sought a ruling based on their refusal to comply with a particular legislative act infringing trustee authority.[52] The clear import of the decision, however, is that constitutional autonomy may be substantially eroded, if not altogether lost, where the governing board acquiesces in unconstitutional higher education legislation.

Alabama

Alabama's constitution provides that the University of Alabama and Auburn University shall each be "under the management and control" of a separate board of trustees.[53] While Alabama Supreme Court decisions have established that the two universities are public corporations whose trustees are officers of the state,[54] there exist no judicial decisions establishing the conditions under which the institutional governing boards possess exclusive control or management of the respective universities. An Alabama Attorney

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[52]Wadloch, "Constitutional Control of the Montana University System: A Proposed Revision," 33 Mont. L. Rev. 76, 83 (1972).

[53]Ala. Const. art. 14, § 264 & amend. 161, § 1.

[54]See Denson v. Ala. Poly. Inst., 220 Ala. 433, 126 So. 133 (1930) and Cox v. Bd. of Trustees of the Univ. of Ala., 161 Ala. 639, 49 So. 814 (1909).

General opinion supports the exclusive nature of the trustee's control and management,[55] but a history of legislative control and the absence of judicial authority confirming autonomy reduces the likelihood that the Alabama higher education system is constitutionally autonomous.

Oklahoma

Oklahoma's 1890 Legislative Assembly placed the government and management of all agricultural and mechanical colleges in a board of regents authorized to direct the expenditure of funds, supervise construction, employ professional staff, audit accounts, and perform other administrative duties.[56] The Oklahoma Constitution of 1907 article VI, § 31 designated the State Board of Agriculture as the Board of Regents of all agricultural and mechanical colleges, and stipulated that the Board of Agriculture "shall discharge such other duties and receive such compensation as may be provided by law."

The leading Oklahoma decision on the status of the Board of Agriculture acting as the Board of Regents of the state agricultural and mechanical colleges [hereinafter "A&M Regents"] is

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[55] Ala. Rep. Atty. Gen. (1919-1920), p. 445.

[56] Wilson's Okl. Rev. & Ann. Stat. art. 18, §§ 280, 283, 287.

Trapp v. Cook Construction Co.[57] In Trapp, an action to compel the State Auditor to pay college construction vouchers placed at issue the legislature's authority to delegate supervision of college construction to a state Board of Public Affairs. The Oklahoma Supreme Court accepted the proposition that the term "other duties" was a constitutional reference to the territorial statutes defining the duties and powers of the A & M Regents. Reasoning that these territorial powers became fixed and vested upon adoption of the constitution, the court held that "additional duties may be required [of the A & M Regents], but none vested by the Constitution may be taken away by the Legislature."[58] The legislative enactment placing power to approve, supervise, and contract for all state construction projects in the state Board of Public Affairs was deemed unconstitutional in its application to the A & M Regents. The decision of the lower court, directing the auditor to pay the construction voucher approved by the A & M Regents, was affirmed.

Following the decision in Trapp the A & M Regents were held to have implied power to do everything necessary to

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[57] 24 Okla. 850, 105 P. 667 (1909).

[58] Id. at 855, 105 P. at 669.

accomplish the objectives of the institution where not expressly or impliedly prohibited by law.[59] This power specifically extended to the collection of incidental student fees[60] and issuance of revenue bonds to finance college construction.[61]

In 1941 the Constitution of Oklahoma was amended to provide for the Oklahoma State Regents for Higher Education, designed to serve as a coordinating board for all Oklahoma higher education institutions. The specific powers of this coordinating board included power to prescribe standards for individual institutions, determine functions and courses of study in each institution, grant degrees, set budget allocations for institutions, and recommend fees for all such institutions.[62] This board was augmented in 1944 by a constitutional provision vesting "government" of the University of Oklahoma in a board of regents[63] and by an amendment transferring control of all agricultural and mechanical colleges from the State Board of Agriculture to

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[59] Connell v. Gray, 33 Okla. 591, 12y P. 417 (1912). See also Pyeatte v. Bd. of Regents of Univ. of Okla. (D.C. 1952), 102 F.Supp. 407, aff'd. 72 S.Ct. 507, 342 U.S. 936, 96 L.Ed. 696, and Rheam v. Bd. of Regents of Univ. of Okla., 161 Okla. 268, 105 P. 667 (1933).

[60] Id.

[61] Baker v. Carter, 165 Okla. 116, 25 P.2d 749 (1933).

[62] Okla. Const. art. XIII-A, § 2.

[63] Okla. Const. art XIII, § 8.

a separate A & M Board of Regents.[64] Another constitutional provision was adopted in 1948 granting "supervision, management and control" of state colleges to the Board of Regents of Oklahoma Colleges.[65]

The constitutional autonomy of the Board of Regents of Oklahoma Colleges or the Board of Regents of the University of Oklahoma has not been established by judicial precedent. While the constitutional provisions establishing these boards conform to autonomous provisions sanctioned by courts in other jurisdictions, their actual legal status remains subject to judicial interpretation. The term "government" has been held to imply broad power to make rules and regulations that will accomplish the objectives of the University of Oklahoma,[66] but power of "government" has been severely restricted in another jurisdiction.[67]

Two decisions of the Oklahoma Supreme Court have upheld constitutional powers specifically vested in the Oklahoma

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[64] Okla. Const. art. VI, § 31a.

[65] Okla. Const. art. XIII-B, § 2.

[66] Rheam v. Bd. of Regents of Univ. of Okla., 161 Okla. 268, 105 P. 667 (1933), Pyeatte v. Bd. of Regents of Univ. of Okla., 102 F. Supp. 407 (D.C. 1952), aff'd 72 S.Ct. 567, 342 U.S. 936, 96 L. Ed. 696.

[67] See State ex rel. Heimberger v. Bd. of Curators of Univ. of Mo., 268 Mo. 598, 188 S.W. 128 (1916).

State Regents for Higher Education [hereinafter "Regents for Higher Education"]. In Board of Regents of University of Oklahoma v. Childers[68] the court held a legislative appropriation to the Southern Oklahoma Hospital void as violative of a constitutional provision requiring legislative appropriations to be made in consolidated form for allocation by the Regents for Higher Education. In addition to the power to disperse allocations to the institutions within the university system, the Regents for Higher Education have power to determine the functions and courses of study at each institution. In Board of Regents of Oklahoma Agricultural and Mechanical Colleges v. Oklahoma State Regents[69] the court concluded that the Regents for Higher Education had the constitutional authority to conduct a feasibility study at a college under the control of the A&M Regents and to change the functions and courses of study at that college. It was not controlling that this constitutional authority would remove the college governance from the A&M Regents and place it under a board of regents to be established by the legislature.

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[68] 197 Okla. 350, 170 P.2d 1018 (1946).

[69] 497 P.2d 1062 (Okla. 1972).

The decision in Board of Regents of Oklahoma Agricultural and Mechanical Colleges v. Oklahoma State Regents clouded the constitutional status of the A & M Regents but did affirm broad powers constitutionally provided to the Regents for Higher Education. The jurisdiction of the various higher education boards established by the Oklahoma constitution will probably require additional resolution by the courts, but the constitutional autonomy of the higher education system, relative to external state government interference, has consistently been sustained by the case law of Oklahoma.

North Dakota

The North Dakota Constitution provides for a State Board of Higher Education "created for the control and administration" of enumerated state colleges and universities.[70] The constitutional provision incorporated by reference the powers of the statutorily created Board of Administration and provided that the North Dakota Board of Higher Education [hereinafter "North Dakota Board"] assume all powers and perform all duties of the Board of Administration.[71] The North Dakota Board was specifically authorized

[70] N.D. Const. art 54, § 1 (amended 1939).

[71] Id. § 6(a).

to prescribe, limit, or modify courses, delegate details of administration, organize and reorganize work of institutions [within statutory limits], provide for their efficient and economic administration, prescribe standardized accounting and recording systems, prepare and present a unified, biennial budget, and control expenditure of institutional funds.[72] In addition, the legislature was required to "provide adequate funds for the proper carrying out of the functions and duties" of the North Dakota Board.[73]

The North Dakota Supreme Court, in Posin v. State Board of Higher Education,[74] stated "The power and authority of the Board [of Higher Education] is to be gathered from the constitutional provision with reference to its creation and the designation of duties imposed upon it by the statutes."[75] The statutes which pertain to the North Dakota Board specify both the powers and the duties of the board.[76] In Posin the authority of the North Dakota Board to discharge faculty for good cause was upheld after the court considered the explicit language of the constitution and the statute law. In the case of Zimmerman v. Minot State College[77]

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[72] N. D. Const. art. 54, § 6(b), (c), (d), & (e).

[73] Id. § 5.

[74] 86 N.W. 2d 31 (N.D. 1957).

[75] Id. at 35.

[76] N.D. Cent. Code § 15-1017 (1943).

[77] 198 N.W. 2d 108 (N.D. 1972).

the supreme court affirmed the power of the North Dakota Board to establish policy and procedures for the employment of faculty where consistent with specific legislative authorization.

However, where legislative enactments granted the North Dakota Board the power to establish the policy of the law and fix the legal principles which control implementation of that policy an unconstitutional delegation of legislative authority has been found. In Nord v. Guy[78] the court held that neither power of "control and administration" nor other powers incorporated in the constitution were sufficient to authorize the North Dakota Board to set costs, establish priorities, and identify institutions where facilities were to be constructed. A state statute authorizing the North Dakota Board to provide educational facilities at the various state institutions of higher education, which made no mention of priority, cost or location of construction was unconstitutional, according to the Nord decision, because it placed legislative power in the hands of "a part of the executive branch of government."[79]

The recognized constitutional status of the North Dakota Board was instrumental in the case of State ex rel. Walker v. Link[80] in which the legislative mandate to provide

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[78] 141 N.W.2d 395 (N.D. 1966)

[79] Id. at 402.

[80] 232 N.W.2d 823 (N.D. 1975).

"adequate funds" for the institutions of higher education was in conflict with a constitutional provision suspending an authorization of funds upon the filing of a referendum petition. The North Dakota Constitution provided that upon the filing of a referendum petition any measure which is a part of the petition is suspended until the referendum is submitted to the voters of the state.[81] The state appropriation to the university was the subject of a petition for a referendum, but the state authorized the withdrawal of funds directly from the state treasury to finance the operation of the university. In a challenge to the state's authority to permit release of the funds, the court held that an irreconcilable conflict between the constitutional provisions would be resolved in favor of the special provision mandating funding. The decision was based on the rule that where conflicting constitutional provisions are irreconcilable, the most recent enactment prevails. Further, the court announced that the same conclusion would result from application of the rule that special constitutional provisions prevail over general constitutional provisions.

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[81] N.D. Const. § 25.

Louisiana

Amended in 1940, Louisiana's constitution provided that Louisiana State University "shall be under the direction, control, supervision and management of a body corporate to be known as the 'Board of Supervisors of Louisiana State University and Agricultural and Mechanical College'" [hereinafter "Louisiana Supervisors"].[82] This grant of power to the Louisiana Supervisors represents an unambiguous investiture of exclusive administrative jurisdiction over the university, containing no provision for legislative oversight or regulation.

The Louisiana Supreme Court held in Student Government Association of L.S.U. v. Board of Supervisors[83] that the intent of the constitutional provision would be frustrated unless immediately effective; thus the provision regarding the powers of the Louisiana Supervisors must be regarded as self-executing. In recognizing the Louisiana Supervisors' authority under the 1940 constitution the court confirmed the implied power to set campus parking fines in excess of a statutorily established maximum.

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[82] La. Const. of 1921, art. XII, § 7 (amended 1940).

[83] 262 La. 849, 262 So.2d 916 (1972).

The court then extended the exclusiveness of the constitutional grant in the following terms:

> The power of "direction, control, supervision and management" includes not only the power to prescribe courses and decrees [sic], to select faculty, and to hire and fire employees. . . ,but also the power to adopt and to enforce administratively, reasonable regulations governing the on-campus activity and conduct of faculty, employees, and students.[84]

The court noted that the original purpose of the constitutional provision granting autonomy was to "guarantee depoliticalization of our universities"[85] by placing exclusive administrative control of the university in the Louisiana Supervisors. To affirm this exclusive grant of administrative power the court observed that no other constitutional provision relating to education permitted the same degree of exclusiveness.

In Roy v. Edwards[86] the Louisiana Supreme Court reaffirmed the holding in Student Government Association and declared unconstitutional a legislative enactment which would have abolished the Louisiana Supervisors and the Louisiana Coordinating Council for Higher Education and merged their functions into a single governing board for higher education. Despite a Louisiana constitutional

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[84] 262 La. at 860-861, 264 So.2d at 920.

[85] Address of the Governor, Official Journal of the Senate (1940) 24-26 as quoted in 262 La. at 856-857, 264 So.2d at 918.

[86] ___ La.___,294 So. 2d 507 (1974).

clause providing that the legislature was authorized to merge or consolidate all executive and administrative boards, the court held that the constitutional provision granting autonomy to the Louisiana Supervisors contained no provision authorizing the legislature to merge or consolidate the Louisiana Supervisors; hence the statute was in direct conflict with the constitution.

In 1974 a revision of the constitution vested the Louisiana Supervisors with the powers of management and supervision of the university and stipulated that the supervisors were a body corporate, but specifically subjected the Louisiana Supervisors to the powers vested in the Louisiana Board of Regents.[87] While no judicial decisions have clarified the relationship between the Louisiana Board of Regents and the Louisiana Supervisors, rulings of the Louisiana Attorney General have contended that the constitutional provisions concerning higher education vest Louisiana's institutional governing boards with authority over the day to day management of the respective institutions of higher education and establish the Louisiana Board of Regents as the higher level

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[87] La. Const. art. VIII, §§ 5, 7.

executive board constitutionally vested with power to plan, coordinate, and budget for all public higher education.[88]

Georgia

The corporate status of the University of Georgia Regents [hereinafter "Georgia Regents"] was established in several cases which predated the vesting of constitutional status under the Georgia Constitution of 1945. In the case of State v. Regents of the University System of Georgia[89] a challenge to the power of the Georgia Regents to issue revenue bonds for the construction of university facilities resulted in a judicial holding that the Georgia Regents were an incorporated entity, empowered to encumber property and issue revenue bonds, to which state debt limitations would not apply. A year after this decision the Georgia Supreme Court concluded that the Georgia Regents' status had been altered by legislative statute to conform to the status of a state government agency.[90] Consequently, the

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[88] La. Op. Atty. Gen. No. 75-22 (Jan. 27, 1975).

[89] 179 Ga. 210, 175 S.E. 567 (1934).

[90] Ramsey v. Hamilton, 181 Ga. 365, 182 S.E. 392 (1935).

Georgia Regents could not be sued without the state's consent, however, the power to sue, consistent with corporate status, was not impaired.

The Georgia Constitution of 1945 included a constitutional provision providing that the Georgia Regents would have "government, control and management of the University System of Georgia and all its institutions in said system."[91] The precise degree of autonomy embodied in this grant of constitutional status is questionable; since the Georgia Supreme Court has expressly confirmed the higher education system's autonomy in only one decision.

Villyard v. Regents of the University System of Georgia,[92] a suit to enjoin the Georgia Regents from operating and offering laundry and cleaning services to officers, employees, and students of the Georgia State College for Women, placed the scope of the Georgia Regents powers before the Georgia Supreme Court. The court ruled that the operation of the college laundry and dry cleaning

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[91] Ga. Const. art. VIII, § IV, ch. 2-6701.

[92] 204 Ga. 517, 50 S.E.2d 313 (1948).

service was within the discretionary power of the Georgia Regents and quoted State v. Regents to the effect that the Georgia Regents possessed broad discretion, thus "Under the [constitutional] powers granted, it becomes necessary to look for limitations, rather than for authority to do specific acts."[93] No legislative enactments or administrative regulations conflicted with the exercise of the Georgia Regents' decision in operating the laundry and dry cleaning service; thus the issue of autonomy from state government interference was not resolved in this action.

A 1975 declaratory judgment of the Georgia Supreme Court held that employment contracts entered into between the Georgia Regents and faculty of the University of Georgia had been breached when the Georgia Regents failed to honor the agreements.[94] The faculty contracts were negotiated on the basis of legislative appropriations which had to be revised when anticipated state revenues fell short of expectations. While the constitutional status of the Georgia Regents was not directly at issue, the court did take judi-

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[93]State v. Regents of the Univ. System of Ga., 179 Ga. 210, 227, 175 S.E. 567, 576 (1934) as quoted in Villyard v. Regents, 204 Ga. at 520, 50 S.E.2d at 316.

[94]Busbee v. Ga. Conf. Am. Ass'n of Univ. Professors, 235 Ga. 752, 221 S.E.2d 437 (1975).

cial notice that the Georgia Governor, the State Comptroller and Department of Administrative Services staff took no action with regard to employment contracts negotiated by the Georgia Regents. The court ruled that a motion to join these external agencies as co-defendants should have been dismissed by the trial court. Busbee judicially acknowledged the practice of exempting the Georgia Regents from approval of faculty contracts by external administrative agencies. Whether the practice is grounded upon legislative exemption or upon the implied constitutional authority of the Georgia Regents is not clear.

Rulings of the Georgia Attorney General have established that the university system is not subject to the provisions of the state administrative procedures act[95] nor does the State Board of Education's statutory authority to enforce standard requirements for educational institutions extend to the Georgia Regents.[96] However, the influence of these decisions on the outcome of issues litigated before the Georgia courts cannot be determined; hence the degree of autonomy available to the Georgia Regents is not completely resolved.

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[95] Ga. Op. Atty. Gen. 1963-65, at 622.

[96] Ga. Op. Atty. Gen. 1974, no. 94, at 190.

Montana

Montana's Constitution of 1972 provided that the "government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage, and control the Montana university system."[97] The scope of the authority thus conveyed to the Montana University System Board of Regents [hereinafter "Montana Regents"] would appear to be extremely broad, granting a high degree of constitutional autonomy.

The Montana Supreme Court has modified the literal meaning of the constitutional provision granting autonomy to the Montana Regents by referring to other provisions of the Montana constitution. The Montana Regents sought declaratory judgments on the constitutionality of statutes setting requirements on line-items university appropriations and specifying approval of budget amendments by the legislative finance committee in the case of Board of Regents of Higher Education v. Judge.[98] The Montana Supreme Court recited constitutional provisions identifying only three branches of state government, vesting appropriation power

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[97] Mont. Const., Art. X, § 9, para (2)a.

[98] ___ Mont. ___ , 543 P.2d 1323 (1975).

in the legislature, and mandating the legislature to account for all expenditures of the state, then concluded that conditions attached to appropriations for the university system were valid exercises of the legislature's constitutional powers. However, the court acknowledged that the legislative conditions must not infringe upon the constitutional powers of the Montana Regents. In determining whether or not the Montana Regents' constitutional powers were infringed the court adopted the test of individually scrutinizing specific legislative conditions. Thus, in the Judge case, legislative conditions setting controls on university system employees unconstitutionally denied the Montana Regents power to determine personnel policies.[99] Further, statutory certification requirements for private monies donated to the university and delegation authority to supervise compliance with private fund certification requirements was an impermissible infringement of the Montana Regents' constitutional power to control and manage these funds.[100]

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[99] ___ Mont. at ___ , 543 P.2d at 1335.

[100] Id. at ___ , 543 P.2d at 1334.

Constitutional Status: Grants of Power Restricted by Limited Legislative Authority

The state constitutions of California, Idaho, Nevada, and South Dakota contain provisions which grant constitutional status to their respective higher education systems. In California, the legislature is empowered only to insure compliance with university endowment terms and oversee investment practices of the university regents. Idaho's legislature may prescribe "regulations" relative to the university system, while South Dakota's legislature establishes "rules and regulations" and Nevada's legislative branch sets "duties" of the university governing board.

California courts have recognized the constitutional autonomy of the university regents and sustained that autonomous status in numerous decisions despite the reservation of limited power in the state legislature. Thus, the California university system ranks with those of Michigan and Minnesota in terms of the degree and scope of powers accorded the governing body of the university system. Idaho's university system has also been accorded autonomous status by judicial decision, but the case law in that jurisdiction has been relatively insubstantial when compared to California. Both Nevada and South Dakota constitutions would appear to place greater limitations on the

grant of autonomy, but in Nevada the authority of a single supreme court decision has elevated the constitutional status of the university governing board, while in South Dakota judicial decisions have not clarified the constitutional powers of the university system's governing body.

California

The California Constitution of 1879 perpetuated the corporate status of the University of California as established by an 1868 act of the California Legislature. The provisions of the legislative enactment specified that the university would be under the charge and control of the Regents of the University of California [hereinafter "California Regents"].[101] The constitutional provision granting university autonomy expressed the restriction that the university is "subject only to such legislative control as may be necessary to ensure compliance with the terms of its endowments and the proper investment and security of its funds."[102]

A series of California Supreme Court decisions established the authority of the California Regents over the

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[101] Cal. Stats. of 1867-68, p. 248.

[102] Cal. Const. art. IX, § 9.

University of California. In Regents of the University of California v. January,[103] the court held that both statute and constitutional provision required the State Treasurer to pay out all funds deposited by the California Regents without regard to the use proposed for such funds. The California Regents were exempted from personal liability in a wrongful death action because of the status of the constitutional corporation,[104] and, while the California Regents had the general rule-making and policy-making power in regard to the university,[105] the university was deemed an instrumentality of the state, clothed with sovereignty only when it is directly and necessarily engaged in a public purpose.[106]

The articulation of the doctrine of constitutional autonomy was central to the resolution of several California cases, including an 1886 decision of the California Supreme Court. In People ex rel. Hastings v. Kewen[107] the supreme court considered the constitutionality of

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[103]66 Cal. 507, 6 P. 376 (1885).

[104]Lundy v. Delmas, 104 Cal. 655, 38 P. 445 (1894).

[105]See In re Royer's Estate, 123 Cal. 614, 56 P. 461 (1899), Bryan v. Regents of Univ. of Cal., 188 Cal. 559, 205 P. 1071 (1922), and Davie v. Bd. of Regents of Univ. of Cal., 66 Cal. App. 695, 227 P. 243 (Dist. Ct. App. 1924).

[106]City St. Improvement Co. v. Regents of the Univ. of Cal., 153 Cal. 776, 96 P. 801 (1908).

[107]69 Cal. 215, 10 P. 393 (1886).

legislative enactments intended to change the governance of Hastings College of Law. Hastings had become affiliated with the University of California System under legislative provisions enacted prior to the adoption of the 1879 constitution. The court determined that the constitution required the university to be continued in the form and character of the laws existing at the time of adoption of the constitution. Since the act affiliating Hastings with the California University System was in existence at the adoption of the constitution, the court reasoned that Hastings' governnance had been incorporated and perpetuated by the constitution. This reasoning forced the conclusion that the legislature was not competent to enforce enactments intended to change the college governance.

A California Regents' policy which required applicants for university admission to furnish proof of smallpox vaccination resulted in separate court of appeals decisions defining the autonomous status of the California Regents. The first case, Williams v. Wheeler,[108] involved an action for mandamus to compel admission based on petitioner's assertion that he conformed to state law requirements exempting individuals conscientiously opposed to vaccination. The

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[108] 23 Cal. App. 619, 138 P. 937 (Dist. Ct. App. 1913).

appeals court looked to the legislative enactments which were held to have been incorporated by reference into the constitution and concluded that the "investment of the authorities of the university with this amplitude of power and discretion in the management of its affairs must be held to include power to make reasonable rules and regulations relating to the health of its students."[109] The court accepted petitioner's contention that the state law requiring vaccination was a general law coming within the legislature's police power and requiring compliance by the California Regents, but rejected the argument that the exemption of those conscientiously opposed to vaccination was a health regulation within the state's police power. In the second case, Wallace v. Regents of University of California,[110] petitioner claimed the California Regents' vaccination requirement was invalid on the ground that the legislature had promulgated a 1921 statute placing the power to make rules and regulations on the subject of vaccination exclusively under the direction of the State Board of Health. The

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[109] 23 Cal. App. at 623, 138 P. at 939.

[110] 75 Cal. App. 274, 242 P. 892 (Dist. Ct. App. 1925).

court considered the legislative enactment a delegation which did not impair the constitutional power of the California Regents to make health regulations and held that a general law which sought only to prohibit or limit power constitutionally granted could have no application to the California Regents.

California courts have frequently relied upon the concept of the constitutional corporation in developing the doctrine of autonomy. In Wall v. Board of Regents of the University of California[111] the District Court of Appeals utilized the corporate status of the California Regents as a basis for denying relief for failure to exhaust administrative remedies. The petitioner, a private citizen, sought to prevent the employment of Bertrand Russell as a member of the university faculty. The court reasoned that the California Regents, as a constitutional corporation, were lawfully entrusted with the management and conduct of the institution's affairs and, in the absence of fraud or oppression, the court had no right to interfere with the discretion of the board.

Two cases involving loyalty oath requirements demonstrated the principle that a general law promulgated under the state's police power will apply to the university as a

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[111] 38 Cal. App. 2d 698, 102 P.2d 533, (Dist. Ct. App. 1940).

constitutional corporation. In Tolman v. Underhill[112] and Fraser v. Regents of the University of California[113] the California Supreme Court accepted the proposition that a general law passed by the legislature under the police power would prevail over university regulations where the subject of legislation was not exclusively a university affair. In the case of loyalty oaths required of state employees the court recognized an intention on the part of the legislature to exclusively occupy the field and noted that the purpose of the legislation was sufficiently broad to conform to that intention. The matter of loyalty oaths was not exclusively a university affair and was a matter of general statewide concern, therefore, the California Regents were prohibited from drafting supplementary local legislation.

California court references to "local" legislation and the "corporate" nature of the California Regents suggest an analogy with cases involving jurisdictional disputes between the state and a home rule municipality. Where the matter in question is deemed exclusively a state concern under the legislature's power to enact laws on behalf of

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[112] 39 Cal.2d 720, 249 P.2d 280 (1952).

[113] 39 Cal.2d 717, 249 P.2d 283 (1952).

the general welfare, no local legislation would be permitted. Thus general legislation prohibiting a strike against a public entity applied to the University of California and its employees.[114] And the university, acting in the capacity of manager of its endowment funds, is not exempt from the application of the California usury laws and is entitled to no sovereign protection in its lending decisions.[115] Similarly, separate actions to compel the California Regents to pay wage and salary increases authorized by negotiated agreements were denied by the court on the ground that power to bind the State Treasurer or to compel appropriations necessary to grant the increases was exclusively a legislative function, beyond the constitutional power of the California Regents.[116]

Continuing with the jurisdictional analogy, it would appear that matters of local municipal concern or an exclusively university affair would be subject to regulation by the constitutional corporation. This proposition is but-

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[114]Newmarker v. Regents of the Univ. of Cal., 160 Cal. App. 2d 640, 325 P.2d 558 (Dist. Ct. App. 1958).

[115]Regents of Univ. of Cal. v. Superior Ct., 17 Cal. 3d 533, 131 Cal. Rptr. 228, 551 P.2d 844 (1976).

[116]Cal. State Employment Ass'n Dist. v. Flournoy, 32 Cal. App. 3d 219, 108 Cal. Rptr. 251 (Ct. App. 1973) cert. denied 94 S.Ct. 724, 414 U.S. 1093, 38 L.Ed.2d 550.

tressed by court decisions establishing the authority of the California Regents to fix salary and wage levels for employees without interference from other state government departments.[117] A series of decisions establishing that the California Regents possess inherent constitutional adjudicative powers to discipline students and terminate staff has also confirmed the exclusive jurisdiction of the constitutional corporation. Based on exclusive jurisdiction arguments the California courts have limited review in student discipline and employee termination hearings to determining whether there was substantial evidence supporting the decision of the California Regents.[118] In California State Employees Association v. Regents of the University of California[119] the California Regents were held to have exclusive jurisdiction over university

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[117]Cal. State Employment Ass'n Dist. v. Flournoy, 32 Cal. App. 3d 219, 108 Cal. Rptr. 251 (Ct. App. 1973) cert. denied 94 S.Ct. 724, 414 U.S. 1093, 38 L.Ed. 2d 550; Cal. State Employment Ass'n Dist. v. State of Cal., 32 Cal. App. 3d 103, 108 Cal. Rptr. 60 (Ct. App. 1973).

[118]See Amluxen v. Regents of Univ. of Cal., 53 Cal. App. 3d 34, 125 Cal. Rptr. 497 (Ct. App. 1975); Ishimatsu v. Regents of Univ. of Cal., 266 Ct. App. 2d 854, 72 Cal. Rptr. 756 (Ct. App. 1968); and Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (Ct. App. 1967).

[119]267 Cal. App. 3d, 73 Cal. Rptr. 449 (Ct. App. 1968).

personnel policy, thus the court concluded that a state statute providing that wage deduction programs for state employees be administered by the State Comptroller or Board of Control disclosed no legislative intent to treat the university system as part of state government for purposes of payroll deductions.

A third category of jurisdictional disputes, disputes involving the concurrent jurisdiction of both the state and the constitutional corporation, was considered in In re Bacon.[120] Arrested student demonstrators challenged the authority of the Berkeley Police Department to make a lawful arrest on the campus of the University of California. The court of appeals acknowledged the California Regents constitutional and statutory authorization to maintain a campus police department, but held that the authorization could confer only a concurrent jurisdiction with that of the local police force and affirmed the legality of the arrests.

Idaho

Idaho's constitution vested in the Board of Regents of the University of Idaho [hereinafter "Idaho Regents"]

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[120] 240 Cal. App. 34, 49 Cal. Rptr. 322 (Ct. App. 1966).

"the general supervision of the university and the control and direction of all funds of, and appropriations to, the university, under such regulations as may be prescribed by law."[121] In addition, the constitution fixed the location of the University of Idaho and provided "all the rights, immunities, franchises, and endowments, heretofore granted thereto by the territory of Idaho are hereby perpetuated unto said university."[122] This latter provision incorporated by reference the territorial act creating the university as a body corporate and prescribing the powers, duties, and authority of the Idaho Regents.

The articulation of the doctrine of constitutional autonomy in Idaho was preceded by a series of decisions that provided authority for the proposition that the Idaho Regents were a constitutionally incorporated body. In essence, these early cases decided a jurisdictional issue by concluding that a claim against the Idaho Regents could be litigated in a state district court. Since a claim against the state required original jurisdiction of the Supreme Court of Idaho, the decision to allow district

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[121] Ida. Const. art. 9, § 10.

[122] See 15th Idaho Territorial Session Laws 17-21 (1888-1889).

courts to hear claims against the Idaho Regents constituted tacit recognition of the university's autonomy from state government.[123]

In response to legislative enactments placing the fiscal affairs of the university under the control of various state officers, the Idaho Regents drafted a resolution denying the authority of the legislature to regulate the university's operation. The resolution declared the independence of the Idaho Regents from statutes requiring deposit of university funds with the State Treasurer, approval of supply and equipment purchases by the State Public Works Department, preaudit of university claims by the State Board of Examiners, and submission of legal actions to the State Attorney General. In State ex rel. Black v. State Board of Education and Board of Regents of the University of Idaho,[124] a petition for writ of prohibition to prevent specific acts implementing the Idaho Regents resolution was filed with the Idaho Supreme Court. The court noted the similarity in wording among the constitutional provisions relating to higher education systems in Idaho, Michigan, and Minnesota, but distinguished the language of Idaho Constitution, Article 9, § 10 because the provision concluded

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[123]See First Nat. Bank of Moscow v. Regents, 26 Ida. 15, 140 P. 771 (1914), Moscow Hardware Co. v. Regents, 19 Ida. 420, 113 P. 731 (1911), and Am. Bonding Co. v. Regents, 11 Ida. 163, 81 P. 604 (1905).

[124]33 Ida. 415, 196 P. 201 (1921).

with a phrase placing control and direction of all university funds or appropriations in the Idaho Regents "under such regulations as may be prescribed by law."[125] Interpreting the meaning of the phrase, the court held

> The regulations which may be prescribed by law and which must be observed by the regents in their supervision of the university, and the control and direction of funds, refer to methods and rules for the conduct of business and accounting to authorized officers. Such regulations must not be of a character to interfere essentially with the constitutional discretion of the board, under the authority granted by the constitution.[126]

In answer to the contention that the State Board of Examiners was authorized by statute and Idaho Constitution article 4, § 18 to examine all claims against the state [including claims against the university and the Idaho Regents], the court referred to precedent establishing that a claim against the university was not a claim against the state. By strictly construing, and therefore limiting, the application of the Board of Examiners powers, the court sought to reconcile conflicting constitutional provisions in a manner that would permit both to stand together. Excluding the Idaho Regents from the application of the constitutional provision requiring examination of all claims against

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[125] 33 Ida. at 426, 196 P. at ___.

[126] Id. at 427, 196 P. at ___.

the state, permitted the court to sustain the Idaho Regents constitutional power to control and direct university funds and appropriations.

In Dreps v. Board of Regents of the University of Idaho[127] the constitutional provision granting autonomy to the Idaho Regents was again construed. An employee of the university sought to recover salary denied to her by the Idaho Regents on the grounds that payment would violate the state's anti-nepotism statute. The supreme court looked to the meaning of "regulations" as the term was intended by the framers of the constitution. In concluding that "regulations" referred only to appropriations the legislature might make to the university, the court accepted the notion that "regulations" referred more "to the manner, method, procedural and orderly conduct of business than to mandatory or prohibitive legislation."[128] Since the legislature had no authority to restrict the Idaho Regents in the manner of their employment of professors, officers, agents, or employees the anti-nepotism statute had no application to the university.

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[127] 65 Ida. 88, 139 P.2d 467 (1943).

[128] Id. at 96, 139 P.2d at 471.

Rulings of the Idaho Attorney General have specifically exempted the University of Idaho from the application of the Idaho Purchasing Act,[129] but have indicated that the university must comply with the preaudit allotment process as to legislative general fund appropriations.[130] In the former opinion the university's constitutional status necessarily exempted the Idaho Regents from the application of the act, although the act did not specifically exempt the university. In the latter opinion, the power of the Idaho Bureau of the Budget to conduct preaudits of university funds [other than general appropriation funds] was denied.

Nevada

Nevada's Constitution of 1864 directs the legislature to establish, support, and maintain a state university, and to prescribe the duties of the Board of Regents of the University of Nevada, who are to control and manage the university.[131] Although constitutional provision specified that the Nevada Legislature would prescribe the duties of

[129] Idaho Atty. Gen. Op. No. 77-17 (1977).

[130] Idaho Atty. Gen. Op. No. 76-65 (1976).

[131] Nev. Const. art. XI, §§ 4, 6, 7.

the Board of Regents of the University of Nevada [hereinafter "Nevada Regents"], the legislature had historically enacted legislation fixing the powers and duties of the Nevada Regents [emphasis added].[132]

The meaning of the constitutional directive to prescribe the duties of the Nevada Regents was construed in King v. Board of Regents of University of Nevada.[133] A taxpayer sought to enjoin the Nevada Regents from appointing a legislatively mandated advisory board of regents. Following dismissal of the action in the lower court the plaintiff appealed, contending that the legislative act unconstitutionally interfered with the Nevada Regents' authority to control and manage the university. The supreme court recognized the Nevada Regents as an office created by the constitution and accepted the proposition that the legislature was without authorization to modify, abolish or otherwise alter the powers and functions of a constitutional corporation.[134] In determining the meaning of the constitutional clause "whose duties shall be prescribed by law" the court referred to the debates of the Nevada constitutional

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[132] Nev. Stat. of 1945, § 3, c. 229 at 448.

[133] 65 Nev. 533, 200 P.2d 221 (1948).

[134] See State v. Douglass, 33 Nev. 533.

convention and concluded that the convention refused to grant the legislature authorization to prescribe the powers of the Nevada Regents. The court reasoned

> [A]bsolute control by the regents undoubtedly finds some restriction in the addition of the clause "whose duties shall be prescribed by law." The indication is just as clear however that the restriction is neither so rigid nor so far reaching as it would have been had it authorized the legislature to prescribe their [Nevada Regents] powers.[135]

The legislative mandate to define the duties of the elected Nevada Regents did not justify the creation of an advisory board. Although the advisory board would not have a vote in university management decisions, the court concluded the legislative statute would change, alter, or modify the powers of the Nevada Regents in the exercise of constitutional prerogatives.

While no other Nevada cases have distinguished the "duties" the legislature may define from the constitutional "powers" vested exclusively in the Nevada Regents, numerous decisions of the Nevada Attorney General have sought to clarify the respective spheres of constitutional authority established in King. The legislature is empowered to require a postaudit of university accounts, but the audit may be conducted by an independent public accountant

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[135] 65 Nev. at 567, 200 P.2d at 236-237.

retained by the Nevada Regents.[136] The Nevada Regents are constitutionally empowered to establish a research institute as a division or department of the university, to enter into contracts to perform research, receive and spend unappropriated monies on behalf of the university, and to purchase land without legislative authorization where funds are acquired over and above a specific legislative appropriation.[137] In addition, the establishment of tax-supported higher education institutions not under control of the Nevada Regents would be an unconstitutional legislative invasion of the Nevada Regents' powers.[138] However, the Nevada Regents are not empowered to construct faculty housing or borrow money for that purpose in the absence of legislative authorization,[139] but neither can the legislature grant power to supervise the construction of university facilities to another agency of the state in derogation of the constitutionally implied power of the Nevada Regents.[140]

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[136] Nev. Rep. of Atty. Gen'l. No. 338, at 296 (1957).

[137] See Nev. Rep. of Atty. Gen'l. No. 428, at 80 (1958), No. 383, at 382 (1958) and No. 124, at 177 (1964).

[138] Nev. Rep. of Atty. Gen'l. No. 479, at 122 (1968).

[139] Nev. Rep. of Atty. Gen'l. No. 881, at 402 (1950).

[140] Nev. Rep. of Atty. Gen'l. No. 290, at 208 (1957) & Nev. Rep. of Atty. Gen'l. No. 146, at 566 (1960).

South Dakota

The South Dakota constitution places the control of higher education institutions in a board of regents "under such rules and restrictions as the legislature shall provide."[141] While the South Dakota Board of Regents [hereinafter "South Dakota Regents"] derive some power from the wording of this constitutional provision, the South Dakota Supreme Court has ruled that the constitutional power to manage and control institutions is specifically subject to legislative power to impose restrictions or make rules to guide the South Dakota Regents.[142] Thus, the supreme court has concluded that "control" did not include discretion to change the character of a school to that of a state teacher's college where legislative statute established the institution as a normal school.[143] However, a legislative statute forbidding unnecessary duplication of programs was not violated where the South Dakota Regents acted under the broad discretion authorized by the constitution and within legislative statute specifying purposes of the institution involved.[144]

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[141] S.D. Const. art. XIV, § 3.

[142] Boe v. Foss, 76 S.D. 295, 77 N.W.2d 1 (1956).

[143] State ex rel. Prchal v. Dailey, 57 S.D. 554, 234 N.W. 45 (1931).

[144] State ex rel. Bryant v. Dolan, 61 S.D. 530, 249 N.W. 923 (1933).

An action to compel the South Dakota Regents to reinstate the appellant as a professor in the higher education system resulted in a decision which emphasized the relationship between the legislature and higher education system. The South Dakota Supreme Court recognized the constitutional power of the South Dakota Regents to employ or dismiss employees of the higher education system but noted that legislative enactments authorizing the South Dakota Regents to employ and dismiss personnel "confirmed and clarified" the constitutional power.[145] The statute permitted the South Dakota Regents to delegate authority over personnel to subordinates, but the court restricted this power by insisting that the regents were limited in delegating the constitutional duty of control.

The constitutional powers of the South Dakota Regents are not well established except where legislative enactments have complimented regent authority. No decision of the South Dakota courts has specifically construed the constitutional status of the South Dakota Regents as autonomous; thus the legal relationship between the university governing body and state government is not clear.

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[145] Worzella v. Bd. of Regents, 77 S.D. 447, 450, 93 N.W. 2d 411, 413 (1958).

Constitutional Status: Grants of Power Restricted by Broad Legislative Authority

Six state higher education systems were surveyed in order to assess the degree of autonomy available to a higher education governing body whose constitutional status is restricted by broad legislative authority. In the states of Colorado, New Mexico, Arizona, Mississippi, Alaska, and Hawaii, the university system is mandated by the state constitution, but the governance of the system is subject to the general legislative power to enact laws on behalf of the university system. Mississippi's constitution reserves to the legislature the power to consolidate or abolish any of the higher education institutions. Hawaii and Alaska require the university regents to formulate policy in accordance with legislative law. Colorado stipulates that the general assembly can subject the university regents to legislative laws and regulations. New Mexico and Arizona place responsibility for maintenance of the university system in the legislative branch.

Public higher education's constitutional status in these states does not suggest autonomy, nor have judicial decisions established the autonomy of the respective state higher education systems. However, the legal status of these states' higher education systems, where defined by case law,

may usefully be compared with the status of higher education systems which have been held to possess a high degree of autonomy, in order that the nature of that autonomy may be delineated.

Colorado

Colorado's constitution of 1876 fixed the location of the University of Colorado at Boulder and provided that the Board of Regents of the University of Colorado [hereinafter "Colorado Regents"] was a body corporate having "general supervision of the university in addition to exclusive control and direction of all funds of, and appropriations to, the university."[146] Early decisions established that the location of the higher education institutions fixed by the constitution could not be changed except by constitutional amendment.[147] However, separate constitutional provision declared the management of all state institutions "subject to the control of the state, under the provisions of the constitution and such laws and regulations as the general assembly may provide."[148]

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[146] Colo. Const. art. IX, §§ 12, 14.

[147] See People ex rel. Jerome v. Regents of the Univ. of Colo., 24 Colo. 175, 49 P. 286 (1897) and In re Senate Resolution Relating to State Inst., 9 Colo. 626, 21 P. 472 (1886).

[148] Colo. Const. art. VIII, § 5.

Colorado court decisions have granted wide latitude to the Colorado Regents, but have never held that the university system possesses constitutional autonomy or attempted to reconcile conflicting constitutional provisions. The Colorado Regents have been held exempt from payment of a state inheritance tax as a "body corporate . . . a department of the state to which is intrusted the supervision and government of the University of the state."[149] University authority to operate buses without meeting Public Utility Commission regulations was sanctioned where the Public Utilities Commission ruled the university was a state agency not subject to commission jurisdiction.[150] A city or municipality has no power to interfere with the management or supervision of activities related to the educational process where the interference takes the form of an admissions tax sought to be applied to educational functions of the university.[151]

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[149] In re Macky's Estate, 46 Colo. 79, 96, 102 P. 1075, 1081 (1909).

[150] Burnside v. Regents of Univ. of Colo., 100 Colo. 33, 64 P.2d 1271 (1937).

[151] City of Boulder v. Regents of Univ. of Colo., 179 Colo. 420, 501 P.2d 123 (1972).

In 1973, Colorado Constitution article IX, § 14 was repealed and article VIII, § 5 was amended by the inclusion of a second paragraph, providing that governing boards of state institutions have powers of supervision and control and direction of funds, but adding the phrase "unless otherwise provided by law." This amendment would appear to harmonize previous constitutional provisions relating to Colorado's system of higher education while denying autonomy to the higher education system. Nevertheless, in Associated Students of University of Colorado v. Regents of University[152] the Supreme Court interpreted "unless otherwise provided by law" as a limitation on the Colorado Regents' constitutional powers only where legislative enactment specifically provides that the law applies to the Colorado Regents.[153] In reversing the grant of an injunction to prohibit the Colorado Regents from entering closed executive session in alleged violation of the Open Meeting Law of Colorado, the Colorado Supreme Court held the special constitutional power of the Colorado Regents did not preclude closed

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[152] ___ Colo. ___, 543 P.2d 59 (1975).

[153] Cf. Sigma Chi v. Regents of the Univ. of Colo., 278 F. Supp. 515, 528 (D. Colo. 1966). The court held that as the Colorado Administrative Procedures Act did not expressly apply to the University, "a body politic which is distinct from the executive branch of government," the statute could not be construed to apply by implication to the university.

executive sessions. The court concluded that the constitutionally granted power of the Colorado Regents to make policy and enact laws for the general supervision of the University could be nullified only by constitutional amendment or legislative statute expressing the unmistakable intent to do so.

New Mexico

The New Mexico Constitution provides that "the legislature shall provide for the control and management" of each institution of higher education by a board of regents for each institution.[154] The implementation of this constitutional provision is accomplished by statute.[155]

No reported decision of the New Mexico courts has specifically affirmed constitutional autonomy of the governing boards for the state's higher education institutions. It has been held that a taxpayer has no standing to compel the Regents of the University of New Mexico to perform alleged constitutional and statutory duties, because the governing board, as a creature of the constitution, owes its obligations to the state and not to a private

[154] N.M. Const. art. XII, § 13.

[155] 1970 N.M. Rep. of the Atty. Gen., No. 70-73 at 122.

citizen.[156] In addition, the New Mexico Supreme Court has sustained the discretion of the Regents of the University of New Mexico in establishing rules for student conduct where the regents acted under constitutional and statutory authority.[157]

Although the constitutional powers of the New Mexico governing boards remain subject to judicial confirmation, the New Mexico Attorney General has affirmed the exclusive constitutional power of the governing boards to establish and enforce rules of student discipline[158] and exercise control over funds donated from private sources or generated from proprietary endeavors.[159] Further, in State ex rel. Sego v. Kirkpatrick,[160] the supreme court sustained partial vetoes of legislative appropriations wherein the legislature had sought to control the expenditure of federal funds available to New Mexico higher education institutions. In dicta the court contended that "funds in the form of scholarships, gifts, donations, private endowments or other

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[156]Womack v. Regents of Univ. of N.M., 82 N.M. 460, 483 P.2d 935 (1971).

[157]Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975).

[158]1970 N.M. Rep. of the Atty. Gen., No. 70-80 at 136.

[159]1973 N.M. Rep. of the Atty. Gen., No. 70-43 at 82.

[160]86 N.M. 359, 524 P.2d 975 (1974).

gratuities granted or given to the institutions, or otherwise received by them from sources other than the state of New Mexico, are not subject to appropriation by the legislature."[161]

Arizona

When taken together, various provisions relating to higher education in the Arizona Constitution specify that the legislature is required to enact laws for "the establishment and maintenance of . . . a university" and the "general conduct and supervision" of the university is vested in a "board of regents for university and state colleges" [hereinafter "Arizona Regents"].[162]

Where the Arizona Regents have acted under color of statutory authority, Arizona courts have cited both statute and constitutional provision in upholding the notion that the Arizona Regents are supreme within the scope of their power to supervise the university system. The Arizona Supreme Court has compelled the State Attorney General to certify revenue bonds issued by the Arizona Regents[163]

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[161] Id. at 370, 524 P.2d at 986.

[162] Ariz. Const. art. XI, §§ 1, 2, 5.

[163] Bd. of Regents of Univ. of Ariz. v. Sullivan, 45 Ariz. 245, 42 P.2d 619 (1935).

and has required the State Auditor to pay warrants approved by the Arizona Regents.[164] Statutory authority existed to support both these decisions. Similarly, where the Arizona Regents were authorized by legislative enactment to promulgate ordinances and undertake construction projects, the court has enjoined a municipality from demanding compliance with municipal building codes.[165]

In the absence of statutory authorization or where statute and presumed constitutional authority conflict, Arizona courts have been less consistent. The absence of legislation authorizing the Arizona Regents to recognize and bargain with a labor union resulted in an Arizona Court of Appeals decision which explicitly refrained from expressing an opinion as to whether or not the Arizona Regents had implied constitutional power to meet and confer.[166] The Arizona Supreme Court has ruled that the Arizona Regents are subject to a general law specifying minimum wages despite an implied exemption manifest in special legislation vesting management and control in the university governing

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[164]Fairfield v. W. J. Corbett Hardware Co., 25 Ariz. 199, 215 P. 510 (1923).

[165]Bd. of Regents of Univ. and State Colleges v. City of Tempe, 88 Ariz. 299, 356 P.2d 399 (1960).

[166]Communication Workers of Am. v. Arizona Bd. of Regents, 17 Ariz. App. 398, 498 P.2d 472 (Ct. App. 1972).

board.[167] While the court has compelled the State Auditor to pay vouchers approved by the Arizona Regents, it has rejected the claim that legislation requiring the auditor to question the public purpose of contractual claims was a violation of the constitutional provisions vesting the Airzona Regents with general conduct and supervision of higher education.[168]

The Arizona Regents have prevailed in only one reported decision in which their constitutional authority to supervise the university and state colleges served as a basis for annulling a state law. In Hernandez v. Frohmiller[169] an initiative state civil service law was successfully challenged in an amicus curiae brief filed by the Arizona Regents. The law placed the supervision of all nonteaching university personnel under the State Civil Service Board, and would, in the opinion of the Arizona Supreme Court, deprive the Arizona Regents of a large part of their constitutional powers.

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[167] State v. Miser, 50 Ariz. 244, 72 P.2d 408 (1937).

[168] Bd. of Regents of Univ. and State Colleges v. Frohmiller, 69 Ariz. 50, 208 P.2d 833 (1949) and Frohmiller v. Bd. of Regents of Univ. and State Colleges, 64 Ariz. 362, 171 P.2d 356 (1946).

[169] 68 Ariz. 242, 204 P.2d 854 (1949).

Mississippi

Under a 1944 amendment to the Mississippi Constitution of 1890 the "management and control" of existing state institutions of higher learning was placed with the Board of Trustees of State Institutions of Higher Learning [hereinafter "Mississippi Trustees"].[170] The Mississippi Board was specifically empowered to contract for personnel services and terminate employment for good cause, but the final proviso of the constitutional provision reserved to the legislature the power to consolidate or abolish any of the higher education institutions named in the provision.[171]

No judicial interpretations of the above amendment have been made by Mississippi state courts. The Mississippi Legislature has enacted laws which purport to establish the general powers and duties of the Mississippi Trustees,[172] and the organization of the major institutions of higher education has been enunciated by promulgations of the legislature.[173] Thus, the acquiescence of the Mississippi

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[170] Miss. Const. art. 8, § 213-A.

[171] Id.

[172] Miss. Code Ann. § 37-101-15.

[173] See Miss. Code Ann. § 37-113-7, et seq.

Trustees in these legislative acts may effectively estop the assertion of autonomy.

Alaska

The Alaska Constitution provides that the University of Alaska is a corporate entity which holds title to all property conveyed to the university system.[174] The disposition and administration of that property is expressly subject to legislative control and the Board of Regents of the University of Alaska, while constitutionally empowered to "govern" the university, must formulate policy "in accordance with law."[175] The variations on the phrase "in accordance with law" have been defined by the Alaska Constitution as related to the lawmaking powers assigned to the legislature.[176] While the Board of Regents of the University of Alaska [hereinafter "Alaska Regents"] has been held to be a constitutional corporation, no case has directly resolved the actual legal status of the University in relationship to other branches of state government.

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[174] Alaska Const. art. VII, § 1.

[175] Id. §§ 1, 2.

[176] Alaska Const. art. XII, § 11.

In University of Alaska v. National Aircraft Leasing Ltd.[177] the university was sued when an aircraft operated by plaintiff was damaged in a landing attempt on the university's experimental floating ice airstrip. The university demanded a jury trial, asserting that its unique status as a constitutional corporation placed the university outside the scope of legislative statutes governing the conditional waiver of sovereign immunity. Following a denial of the demand for jury trial in the lower court, the university appealed the determination that state statute required the suit to be tried by the court. The Alaska Supreme Court reviewed the constitutional provisions relating to the university and the legislative enactments which purported to subject the university to legislative and executive control, and held that the university was an instrumentality of the state subject to the provisions of the legislative limitations on immunity. In dicta, the court recognized that the university was of a unique character, "which enjoys in some limited respects a status which is co-equal rather than subordinate to that of the executive or the legislative arms of government."[178] The university's status included an inherent right to sue and

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[177] 536 P.2d 121 (Alaska, 1975).

[178] Id. at 128.

be sued, and excluded the university from application of a state statute allocating agencies within a given number of principal departments in the executive branch. However, the court concluded that neither unique corporate status nor inherent power to sue and be sued detracted from the controlling consideration that the university is an integral part of the state's educational system, a state agency for purposes of the application of the statute affecting immunity.

The constitution's explicit provision for legislative control of policy formulation and administration of university property forces the conclusion that the University of Alaska is not constitutionally autonomous of legislative and executive control. The amount of control the legislative and executive branches can exercise by statute is not clear, but the line of permissible control would appear to extend to the management and reporting of the university's financial resources, particularly as distributed to the university by the legislature.[179]

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[179]Letter from Avrum M. Gross, Attorney General, State of Alaska, to Bill Ray, Alaska State Senator (May 7, 1976).

Hawaii

The Constitution of Hawaii established the University of Hawaii as a body corporate and empowers the Board of Regents of the University of Hawaii [hereinafter "Hawaii Regents"] to formulate policy and exercise control over the university "in accordance with law."[180] The similarity between these provisions in the Hawaii Constitution and the provisions regarding the University of Alaska in the Alaska Constitution suggests that the constitutional status of both governing boards would be subject to the same judicial interpretation. No decisions of the Hawaii Supreme Court have ruled on the degree of autonomy available to the University of Hawaii or to the Hawaii Regents. Consequently, it is premature to attempt to assess the constitutional status of the higher education system in Hawaii.

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[180] Hawaii Const. art. IX, §§ 4, 5.

CHAPTER FOUR

CONSTITUTIONAL AUTONOMY IN THE STATE UNIVERSITY SYSTEM OF FLORIDA

Statutory Status of Florida's State University System

The Florida Constitution of 1968 stipulated that "Adequate provision shall be made by law . . . for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require."[1] Constitutional power to make laws was vested in the Florida Legislature;[2] hence, the legislature's authority to regulate and prescribe the powers and duties of the higher education governing body is without constitutional limitation.

Florida's State Board of Education is a constitutional body consisting of the governor and cabinet empowered to exercise "such supervision of the system of public education as is provided by law."[3] Under Florida statute law the

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[1] Fla. Const. art. IX, 1.

[2] Id., art. III, § 1.

[3] Id., art. IX, § 2.

State Board of Education is authorized to approve rules and regulations adopted by the governing board for the State University System of Florida.[4] This authority has been held to constitute veto power over rules and regulations of the higher education governing board so that these rules and regulations never become operative; however, the State Board of Education has no authority to initiate rules or to repeal rules once the rule becomes operationally effective.[5]

Under Florida statute law the Board of Regents of the State University System of Florida [hereinafter "Regents"] is charged with the responsibility of operating the Florida university system.[6] The Regents are intended to serve as a policy-making board which may adopt rules and regulations and supervise the higher education system consistent with legislative enactments.[7] The Regents' power to establish rules for the management of the university system has been mandated by statute,[8] and confirmed by case law.[9]

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[4] Fla. Stat. 240.031 (1975).

[5] Tallahassee Democrat v. Fla. Bd. of Regents, Fla. Appl. 314 So.2d 1964 (Dist. Ct. App. 1975).

[6] See Fla. Stat. ch. 240 (1975).

[7] Fla. Stat. 240.001(2) (1975).

[8] Fla. Stat. 240.042 (1975).

[9] Cornwell v. Univ. of Fla., Fla. App. 307 So.2d 203 (Dist. Ct. App. 1975).

Proposed Revision of the Florida Constitution

The statutory status of the Regents of the State University System of Florida permits any interference into the affairs of the university system which may be explicit or implied by legislative enactment. In addition to the legislature's power to direct university system affairs, the State Board of Education and numerous other agencies of state government can be statutorily authorized to exercise discretion with regard to matters of university governance. Thus the legislature is constitutionally empowered to exercise unlimited control over the university system, and that power may be transferred to other state administrative bodies within broad constitutional limits.

A constitutional amendment granting autonomy to the Regents represents a method to insure that reasonable authority over the governance of the university system is secured to the university system governing board. Such an amendment might take the following form:

> Section 1. There shall be a board of regents of the state university system of Florida, a body corporate, which shall have full power, authority, and responsibility to supervise, coordinate, manage and control the state university system and exclusive control and direction of all funds of, and appropriations to, the state university system. The legislature shall pass no law which infringes upon, alters, modifies or transfers to another body any of the authority provided by this section, anything in this constitution to the contrary notwithstanding.

> Section 2. The board of regents of the state university system of Florida shall consist of nine members appointed by the governor and confirmed by the senate to overlapping nine-year terms as provided by law.

Legal Implications of Adoption

The legal effect of the provision granting constitutionally autonomous status would be to enlarge the powers of the Regents. The constitutional provision would be regarded as a limitation upon the powers of the state legislature[10] and would presumably be self-executing.[11] The legislature's role in the state university system would be narrowed to the exercise of control through the powers of appropriation, postaudit, creation and assignment of other higher education institutions, and implementation of the constitutional mandate to provide for the Regents' nine-year overlapping terms. Additionally, the Florida Senate would have power to consent to the appointees of the governor. The Regents' basic corporate powers would inhere under the

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[10] See Peters v. Meeks, 163 So.2d 753 (Fla. 1964) and King v. Bd. of Regents of the Univ. of Nev., 65 Nev. 533, 200 P.2d 221 (1948).

[11] See Gray v. Bryant, 125 So.2d 846 (Fla. 1960) and Bd. of Regents of L.S.U. v. Student Gov't. Ass'n. of L.S.U. 262 La. 849, 264 So.2d 916 (1972).

constitution,[12] and no alteration or modification of those powers could be effectuated by statute.[13] While the legislature could prescribe additional duties, none of the powers or duties conferred under the constitution could be taken from the Regents,[14] nor could the Regent's power be transferred to another agency of the state.[15]

The purpose of the provision granting autonomy is to confer on the Regents full power in the conduct of exclusively university system affairs. In general, the Regents may provide for the exercise of all powers connected with the proper and efficient governance of the university system. However, the constitutional provision does not grant absolute power of self-government, and there are limitations beyond which the Regents cannot go.

Limitations on Board of Regents Autonomy

Limitations of both the state and federal constitutions would apply to the Regents. The university system could neither abridge nor deny any of the rights protected

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[12] See Univ. of Alaska v. National Aircraft Leasing Ltd., 536 P.2d 121 (Alas. 1975).

[13] King v. Bd. of Regents of Univ. of Nev., 65 Nev. 533, 200 P.2d 221 (1948).

[14] Trapp v. Cook Constr. Co., 24 Okl. 850, 105 P. 667 (1909).

[15] State ex rel. v. State Bd. of Educ., 33 Idaho 415, 196 P. 201 (1921).

by constitutional guarantees.[16] Legislative delegation of additional powers going beyond the constitutional authority of the Regents would be impermissible, nor could the Regents go beyond the confines of their authority on a subject no matter how laudable the purpose may be.[17]

Legislation on subjects that pertain to the general welfare, enforcing state-wide standards for public health or safety through exercise of the state's police power would apply to the Regents.[18] Constitutional autonomy does not support the presumption that the state surrender or relinquish legislative power to declare the public policy of the state, thus a general statute which effects a university system affair only incidentally in the accomplishment of a state-wide concern has been held to apply to the higher education system.[19] However, the fact that the state has legislated on a subject does not necessarily deprive the Regents of power over the subject of the enactment.

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[16] See State ex rel. Lawson v. Woodruff, 134 Fla. 437, 184 So. 81 (1938).

[17] Cal. State Employment Ass'n. v. Flournoy, 33 C.A.3d 219, 108 Cal. Rptr. 251 (1973), cert. denied, 94 S.Ct. 724, 414 U.S. 1093, 38 L.Ed.2d 550.

[18] Tolman v. Underhill, 39 Cal.2d 708, 249 P.2d 280 (1952).

[19] Branum v. State, 5 Mich. App. 134, 145 N.W.2d 860 (Ct. App. 1966).

Both the state legislature and the Regents may have concurrent jurisdiction over the same subject matter as it relates to the university system and in the absence of conflict, both enactments can stand.[20]

Legislation Relating to State-wide Concerns

In applying the rule that the general law is controlling as to matters of general state-wide concern, whereas the constitutional autonomy of the Regents is controlling as to matters of exclusive university system affairs, it has been held that the determination of an exclusively university system affair is difficult to determine; thus, courts consider each case as it arises and draw the line of demarcation.[21] Nevertheless, a large body of case law relative to constitutionally autonomous higher education systems has reduced the number of instances in which a judicial determination is compelled.

Courts have concluded that a matter is not exclusively a higher education affair but is of general state-wide concern where statute and case law reflect a developed legal

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[20] In re Bacon, 240 Cal. App. 34, 49 Cal. Rptr. 322 (Ct. App. 1966).

[21] Wallace v. Regents of Univ. of Cal., 75 Cal. App. 274, 242 P. 892 (Dist. Ct. App. 1925).

theory or a general social policy of the state. Specifically, courts have upheld the application of the doctrines of sovereign immunity[22] and eminent domain[23] to the public higher education system on the ground that the independence of the higher education governing board, an instrumentality of the state devoted to a public purpose, is not threatened by these doctrines.[24] In cases dealing with the application of workmen's compensation,[25] public employee rights,[26] and public health standards[27] courts have concluded that legislative enactments on these subjects had only an incidental impact on the governance of the higher education system and did not infringe on the constitutional autonomy of the board. It seems likely that similar enactments, such as the fixing of a state minimum wage law, would be

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[22]Perry v. Regents of Univ., 127 Ga. App. 42, 192 S.E.2d 518 (Ct. App. 1972); Branum v. State, 5 Mich. App. 134, 145 N.W.2d 860 (Ct. App. 1966).

[23]Knapp v. State, 125 Minn. 194, 145 N.W. 967 (1914).

[24]But see Christie v. Bd. of Regents of the Univ. of Mich., 364 Mich. 202, 111 N.W.2d 30 (1961) where Regent's purchase of liability insurance, under implied constitutional authority, was held to remove historic reason for immunity.

[25]Peters v. Mich. State College, 320 Mich. 243, 30 N.W.2d 854 (1948).

[26]Mich. Employment Relations Comm'n v. Regents of the Univ. of Mich., 389 Mich. 96, 204 N.W.2d 218 (1973). See also Newmarker v. Regents of Univ. of Cal., 160 Cal. App.2d 640, 325 P.2d 558 (Ct. App. 1958).

[27]Wallace v. Regents of the Univ. of Cal., 75 Cal. App. 274, 242 P. 892 (Ct. App. 1925).

sufficiently broad in scope and social purpose to apply to the autonomous higher education system.[28] Finally, the authority of the legislature to establish the jurisdiction of state courts hearing cases where the higher education governing board is a party, has been confirmed.[29]

Legislation Concerned with University System Affairs

Courts have held a statute violative of the constitutional autonomy of the higher education system where the statute transferred power over the higher education system to another agency of the state. Legislative statutes which purport to require a constitutionally autonomous higher education governing board to obtain the prior approval of another state agency before making university system expenditures have been held unconstitutional.[30] Similarly, legislative attempts to delegate power of supervisory control over the university system to a state administrative

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[28] See State v. Miser, 50 Ariz. 244, 72 P.2d 408 (1937).

[29] E.g. Glass v. Dudley Paper Co., 365 Mich. 227, 122 N.W.2d 489 (1962); Ishimatsu v. Regents of Univ. of Cal., 266 Cal. App.2d 854, 72 Cal. Rptr. 756 (Ct. App. 1968).

[30] State ex rel. Univ. of Minn. v. Chase, 175 Minn. 259, 220 N.W. 951 (1928); Bd. of Regents of Univ. of Mich. v. Auditor-General, 167 Mich. 444, 132 N.W. 1037 (1911).

board violate the higher education governing board's autonomy.[31] Statutory authorization establishing an advisory board to assist the higher education governing board or providing that the State Civil Service Commission supervise nonteaching personnel of the higher education system would appear to be unconstitutional in an autonomous higher education system.[32]

Legislation requiring specific acts of higher education management or academic policy implementation has either been deemed inapplicable to the higher education system or declared unconstitutional. Among those legislative enactments which require specific acts of higher education management, courts have declared unconstitutional statutes changing the governance of a college,[33] or placing restrictions on the employment of university employees,[34]

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[31]State ex rel. Black v. State Bd. of Educ., 33 Ida. 415, 196 P. 201 (1921); State Bd. of Agriculture v. State Administrative Board, 226 Mich. 417, 197 N.W. 160 (1924).

[32]See Hernandez v. Frohmiller, 68 Ariz. 242, 204 P.2d 954 (1949) [civil service] and King v. Bd. of Regents of Univ. of Nev., 65 Nev. 533, 200 P.2d 221 (1948) [advisory board].

[33]People v. Kewen, 69 Cal. 215, 10 P. 393 (1886).

[34]Dreps v. Bd. of Regents of the Univ. of Ida., 65 Ida. 88, 139 P.2d 467 (1943).

or prescribing the amount of federal funds to be used in support of a college department.[35] Special legislation has been deemed an unconstitutional encroachment on the autonomous university governing board where the legislation seeks to compel the board to appoint a professor[36] or to establish a college and prescribe the location of that college.[37] Further, in the absence of express statutory reference to the higher education system, courts have held general legislation inapplicable to the autonomous university governing board where the legislation required payroll deductions to be made by the state comptroller[38] or compelled contractor's bonds to be arranged for university building construction.[39] In a related case, closed executive sessions of the university governing board were held

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[35]State Bd. of Agriculture v. Fuller, 180 Mich. 349, 147 N.W. 529 (1914).

[36]People v. Regents of Univ. of Mich., 18 Mich. 468 (1869).

[37]Sterling v. Regents of Univ. of Mich., 110 Mich. 369, 68 N.W. 253 (1896).

[38]Cal. State Employees Ass'n. v. Regents of Univ. of Cal., 267 Cal. App.2d 667, 73 Cal. Rptr. 449 (Ct. App. 1968).

[39]Weinberg v. Regents, 97 Mich. 246, 56 N.W. 608 (1893).

not violative of an open meeting law because of the unique constitutional status of the higher education governing board.[40]

Distinctions Between Appropriation and Expenditure

It has been conceded that limits must be placed on the legislature's power to condition appropriations to the university system, otherwise the power of the conditioned appropriation could be used to strip the governing board of constitutional authority.[41] However, it is equally clear that the higher education system is not beyond the rule-making power of the legislature, and the legislature can attach reasonable conditions to its university system appropriations.[42] The distinction between conditions the legislature may validly attach and those which constitute unconstitutional interference with the autonomous governing board was described in a Minnesota Supreme Court decision.

> At one extreme, the Legislature has no power to make effective, in the form of a law, a mere direction of academic policy or administration. At the other extreme it has the

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[40]Associated Students of Univ. of Colo. v. Regents of the Univ., ____Colo.____, 543 P.2d 59 (1975).

[41]Sterling v. Regents of Univ. of Mich., 110 Mich. 369, 68 N.W. 253 (1896).

[42]State ex rel. Univ. of Minn. v. Chase, 175 Minn. 259, 220 N.W. 951 (1928).

> undoubted right within reason to condition appropriations as it sees fit. "In such case the regents may accept or reject such appropriation* * *If they accept, the conditions are binding on them." [citations omitted][43]

Courts have adopted the general rule that a proper exercise of the legislative appropriation power results where legislative conditions or procedures for compliance with conditions do not infringe directly or indirectly on the essential constitutional powers granted the higher education governing board.[44] Conditions which the legislature can validly attach to appropriations include requirements that prescribed accounting practices be used,[45] that standardized reporting be implemented, and that grants for the maintenance of all departments in a university be effectuated.[47] Courts have also upheld legislative conditions which allocated funds by line-item appropriation[48]

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[43]175 Minn.at 268, 220 N.W.at 955.

[44]E.g. Bd. of Regents of Higher Educ. v. Judge, 543 P.2d 1323 (Mont. 1975); Bd. of Regents of Univ. of Okla. v. Childers, 197 Okl. 350, 170 P.2d 1018 (1946).

[45]See State ex rel. Black v. State Bd. of Educ., 33 Idaho 415, 196 P. 201 (1926).

[46]Regents of Univ. of Mich. v. State, 395 Mich. 52, 235 N.W.2d 1 (1975).

[47]Regents of Univ. of Mich. v. Auditor-General, 167 Mich. 444, 132 N.W. 1037 (1911).

[48]Bd. of Higher Educ. v. Judge, supra note 44.

or specified the general purpose of a grant.[49] On the other hand, courts have held invalid conditions setting limitations on the amount of expenditures for a given department at a college,[50] stipulating that a particular university program be instituted at a given location,[51] or providing a specific grant to a particular institution in order to circumvent the board's authority to allocate funds.[52]

While the nature and extent of legislative conditions which may be validly attached to higher education appropriations have not been totally resolved, two related issues have been given considerable attention by the courts. First, the legislature has no authority to attach conditions to higher education funds derived from sources other than legislative appropriations.[53] The proceeds of federal land

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[49]State Bd. of Agriculture v. State Administrative Bd., 226 Mich. 417, 197 N.W. 160 (1924).

[50]State Bd. of Agriculture v. Fuller, 180 Mich. 349, 147 N.W. 341 (1914).

[51]Sterling v. Regents of Univ. of MIch., 110 Mich. 369, 68 N.W. 253 (1896).

[52]Bd. of Regents of Univ. of Okla. v. Childers, 197 Okl. 350, 170 P.2d 1018 (1946).

[53]State Bd. of Agriculture v. State Administrative Bd., 226 Mich. 417, 197 N.W. 160 (1924). See also State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

grants, federal appropriations, and private donations to autonomous higher education systems may be required to be reported to the state, but these proceeds are not subject to the legislature's power to condition appropriations.[54] Second, conditional appropriations which require preaudit or compliance authorization, placing supervisory control over higher education funds in a state administrative agency, have been held unconstitutional.[55] Legislative conditions must be complied with where the governing board accepts the specific appropriation, but a requirement to insure compliance by transferring control of expenditures to another state governmental entity is violative of the board's constitutional powers.[56] In support of this position, courts reason that once an appropriation is made the fund passes to the higher education governing board, and becomes the property of the higher education system, to be expended under the exclusive control and direction of the board.[57]

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[54] State ex rel. Black v. State Bd. of Educ., 33 Ida. 415, 196 P. 201 (1926).

[55] E.g. Bd. of Regents of Univ. of Mich. v. Auditor-General, 167 Mich. 444, 132 N.W. 1037 (1911), State Bd. of Agriculture v. State Administrative Bd., 226 Mich. 417, 197 N.W. 169 (1924), Trapp. v. Cook Constr. Co., 240 Okl. 850, 105 P. 667 (1909).

[56] Bd. of Regents of Higher Educ. v. Judge, 543 P.2d 1323 (Mont. 1975).

[57] See Weinberg v. Regents of Univ. of Mich., 97 Mich. 246, 56 N.W. 605 (1893).

Powers Implied in Autonomous Constitutional Status

Courts have implied numerous specific powers from the broad grant of authority delegated to the constitutionally autonomous higher education system. The higher education governing board has been held to have implied constitutional authority to exceed legislatively established tuition rates[58] and campus parking fines.[59] The authority of the board to set additional health requirements for admission or to establish residence standards for the exclusive purpose of fixing tuition has also been confirmed by the courts.[60] As against a city or municipality, there exists authority to support the contention that an autonomous university system is exempt from the application of municipal building codes,[61] admissions taxes on educational

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[58] Kowalski v. Bd. of Trustees of MaComb County Community College, 67 Mich. App. 74, 240 N.W. 2d 273 (Ct. App. 1976).

[59] Bd. of Regents of L.S.U. v. Student Government Ass'n of L.S.U., 262 La. 849, 264 So.2d 916 (1972).

[60] Schmidt v. Regents of Univ. of Mich., 63 Mich. App. 54, 233 N.W.2d 855 (Ct. App. 1975) (out-of-state residency); Wallace v. Regents of Univ. of Cal., 75 Cal. App. 274, 242 P. 892 (Ct. App. 1925).

[61] See Bd. of Regents of Univ. and State Colleges v. City of Tempe, 88 Ariz. 299, 356 P.2d 399 (1960).

functions,[62] and taxes for police and fire protection where no contract for such services existed.[63] The supervisory power of the governing board and the board's control over funds of the higher education system have been held to imply the exclusive right to contract for employees,[64] establish and maintain a university infirmary,[65] construct dormitory buildings,[66] operate laundry and dry-cleaning facilities,[67] make voluntary payments to a school district (in lieu of taxes),[68] and to construct a postal facility and contract for postal services.[69] In addition, the management responsibilities of the constitutionally autonomous

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[62] See City of Boulder v. Regents of Univ. of Colo., 179 Colo. 420, 501 P.2d 123 (1972).

[63] Lucking v. People, 320 Mich. 495, 31 N.W.2d 707 (1948).

[64] Busbee v. Ga. Conf. Am. Ass'n. of Univ. Professors, 235 Ga. 752, 221 S.E.2d 437 (1975).

[65] Davie v. Bd. of Regents of Univ. of Cali., 66 Cal. App. 695, 227 P. 243 (Dist. Ct. App. 1924).

[66] Fanning v. Univ. of Minn., 183 Minn. 222, 236 N.W. 217 (1931).

[67] Villyard v. Regents of Univ. System of Ga., 204 Ga. 517, 50 S.E.2d 313 (1948).

[68] Sprik v. Regents of Univ. of Mich., 43 Mich. App. 178, 204 N.W.2d 62 (Ct. App. 1972).

[69] Bauer v. State Bd. of Agriculture, 164 Mich. 415, 129 N.W. 713 (1911).

governing board are judicially acknowledged to include exclusive power to appoint faculty,[70] establish and enforce standards of conduct for students,[71] conduct quasi-judicial hearings concerning matters of student discipline and termination of personnel,[72] and, in general, establish all rules and regulations which the board considers necessary for the benefit of health, welfare, morals and education of students.[73]

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[70]Searle v. Regents of Univ. of Cal., 23 Cal. App.2d 452, 100 Cal. Rptr. 194 (Ct. App. 1972); Wall v. Bd. of Regents of Univ. of Cal., 38 Cal. App.2d 698, 102 P.2d 533 (Dist. Ct. App. 1940).

[71]Goldberg v. Regents of Univ. of Cal., 248 Cal. App.2d 867, 57 Cal. Rptr. 463 (Ct. App. 1967).

[72]Ishimatsu v. Regents of Univ. of Cal., 266 Cal. App.2d 854, 72 Cal. Rptr. 756 (Ct. App. 1968).

[73]Pyeatte v. Bd. of Regents of Univ. of Okla., 1972 F. Suppl. 407 (D.C. 1952), aff'd. 72 S.Ct. 567, 342 U.S. 936, 96 L.Ed. 696.

CHAPTER FIVE

CONCLUDING DISCUSSION

Autonomous higher education is a tradition rooted in the history of American colleges and universities and in the heritage of Western European thought.

> The university has long been referred to as a guild or republic of scholars. This description is a heritage from its origins. The university derives its name from the Latin universitas which in Roman law carried the connotation of a corporation. When professors and students were first drawn together in medieval times they formed a voluntary corporation. To do so they did not need the permission of civil authorities. They became a self-governing body and have continued to be so more or less, throughout their history.[1]

Higher education in the United States no longer reflects the medieval identity of the university. The intellectual model may still derive from European tradition, but higher education has been transformed into an enterprise which requires public support in order to serve

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[1] J. S. Brubacher, The Courts and Higher Education 76 (1971).

society's social and technological needs. This modern transformation has engendered conflict predicted by Waldo in his observation that "as the university becomes increasingly an instrument of government there will be severe problems arising from lack of congruence between academic norms and ideology and our general governmental-political norms and ideology."[2]

Despite conflict and incongruence the American political system continues to affirm support for the independence of higher education.

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation.[3]

Chief Justice Warren's dicta in Sweezy has been reflected in the constitutional status afforded many public higher education systems in the United States and in the acknowledged fact that American higher education remains a decentralized system of diverse institutional forms rather than a single national system.

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[2]Waldo, "The University in Relation to the Governmental-Political," Pub. Ad. Rev., March-April, 1970, 111-112.

[3]Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1211, 1 L.Ed.2d 1311, 1324 (1957).

American colleges and universities are substantially independent of policy determination by external bureaucracy; yet the concern for maintaining that independence has intensified in this century. The Carnegie Commission has noted

> Institutional independence never has been total, nor should it be. Higher education also has never had less independence from public control, in all of American history, than it now has. More institutions of higher education are public than ever before. The great change of the past decade was . . . the quiet increase in public power--by governors, by legislators.[4]

Preserving the independence of American higher education has received strong positive emphasis in numerous reports by commissions studying higher education in this century.[5] In 1952, the Commission on Financing Higher Education produced a report which emphasized the need to maintain diverse institutional forms of higher education in order to insure institutional independence. The Commission expressed concern over government centralization's impact on higher education, particularly where standardization of practices and uniformity of methods were being superimposed on the public higher education system.[6] In 1959 the Eisenhower

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[4]Carnegie Commission on Higher Education, Priorities for Action: Final Report of the Carnegie Commission on Higher Education 59 (1973).

[5]See Id. at 167.

[6]Commission on Financing Higher Education, Nature and Needs of Higher Education 56 (1952).

Committee report, The Efficiency of Freedom, documented numerous bureaucratic intrusions into the governance of higher education systems and concluded that state governmental controls threatened to usurp the power of education policy making.[7] Two reports on higher education published in 1971 strongly endorsed the lay governing board concept of higher education governance, opposed the imposition of uniform regulations on state systems of higher education, and reemphasized the need for independence among higher education institutions in order that institutions may flexibly respond to the public's postsecondary education needs.[8] The Carnegie Commission placed high national priority on the maintenance of reasonable independence for institutions of higher education in its 1973 study.[9]

The case for a reasonable independence from state government interference rests on the historical tradition of autonomous colleges and universities and "on the professional nature of many of the decisions that must be made, on the need to elicit the devotion and sense of responsibility of the major groups internally involved, [and] on the wisdom of

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[7]The Committee on Government and Higher Education, The Efficiency of Freedom 7 (1959).

[8]See Assembly on University Goals and Governance, First Report (1971) & United States Office of Education Task Force on Higher Education, Report on Higher Education (1971).

[9]See Carnegie Commission on Higher Education, Governance of Higher Education: Six Priority Problems (1973).

drawing advice and support from interested private citizens."[10]

The case against legislative interference in the governance of higher education is implied in the following analysis.

> Legislatures, made up of varied personnel and subject to frequent and violent changes in composition according to the fluctuating political fortunes of parties and individuals, and convening for short and crowded sessions . . . cannot give the continuous study and whole-hearted devotion which is requisite to the development of a wise educational policy for the state. . . . [F]ew if any members are likely to have had any experience in the study of problems of higher educational administration, and many of them will possess but slight comprehension or any sympathy with the aims and methods of academic and scientific teaching and research.[11]

Perhaps the greatest threat to the state higher education system, however, is the bureaucratic intrusion which received stimulus from delegations of power by legislature or executive.

> Universities are instruments for the criticism of ends as well as for the development of instrumentalities and means, and they must therefore maintain full intellectual

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[10] J. J. Corson, The Governance of Colleges and Universities 51 (1971).

[11] E. C. Elliot & M. M. Chambers, The Colleges and the Courts 509 (1936).

> independence and autonomy. . . . The threat of government control has to be guarded against. But the significant threat is the impalpable influence of government. The resources of government are so great that the universities in their growth and in their direction may lose the power or the will to be self-determining.[12]

Theoretical autonomy involves a wide range of issues related to the academic freedom of a higher education institution. Corson wrote that "autonomy comprehends, in addition to the latitude required for administrative action . . . , the freedom of the academic department, of the professional school, and of the research institute within the institution to make most of the decisions of academic management."[13]

From an operational standpoint institutional autonomy may be viewed as the delegation of exclusive authority over specified matters to the higher education institution. In the view of the Carnegie Commission, matters which should be exclusively determined by the higher education institution include the power to assign funds to specific purposes; expend funds subject only to postaudit; determine assignments, work loads, salaries and promotion of university employees; select individual faculty, administrators, and students; establish academic policies on grading, degree granting,

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[12] Frankel, "Issues in Higher Education," E. N. Shiver (ed), Higher Education and Public International Service 41 (1967).

[13] J. J. Corson, supra note 10, at 51.

course offerings, and program development; and fix policies on academic freedom, growth rate, and administration of research and service activities.[14]

Theoretical and operational concepts of institutional autonomy are not precisely the same as the concept of constitutional autonomy. While the higher education system may be composed of a single state university in some states, it may be made up of numerous higher education institutions under a single governing board or coordinating board in other states. What is clear is that constitutionally autonomous status can have the legal affect of distinguishing those issues which are of particular and exclusive concern to the higher education system by granting independent power to the higher education governing board. The function of defining the powers and duties of the higher education governing board is transferred by constitutional mandate from the legislative branch to the governing board. The powers thus conferred to the governing board are limited only by express constitutional language or reasonable implications related to constitutional language.

The advantage of placing broad constitutional powers exclusively in the hands of the higher education governing board is that such a board, chosen for long terms and

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[14] See Carnegie Commission on Higher Education, supra note 9, at 168-170.

reasonably independent of external state government control, is likely to exhibit the qualities of understanding and experience that will permit wise judgment in dealing with matters of educational policy making. The lay governing board thus becomes the link between the higher education system and the society, preserving reasonable autonomy for the system and adapting the system to meet changing social needs.

> The alternative to the lay governing board . . .is increased exercise of governmental authority over colleges and universities in accordance with ever more detailed provisions of public law and ever more careful scrutiny by executive agencies. . . .The sure way to encourage the expansion of such legislative and executive oversight is to diminish the authority of lay governing boards.[15] [emphasis added]

The wise exercise of constitutional autonomy by a higher education governing board requires an understanding of the dimensions of the constitutional grant. State supreme court confirmation of the constitutional autonomy of the higher education governing board is sine qua non for resolution of the actual constitutional status of the board. In addition, the board is subject to reasonable limitations despite the unrestricted nature of the constitutional grant.

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[15]J. D. Millet, Strengthening Community in Higher Education 61 (1974).

No specific theory of immunity from legislative acts has clearly emerged to guide the governing board in predicting the outcome of litigation involving issues of higher education autonomy; however, legal precedent in other jurisdictions can be relied upon to reduce the number of issues subject to litigation. Courts in jurisdictions which have confirmed autonomy look at the degree that legislation interferes with the constitutional power of the governing board in relation to the particular issue before the court. This judicial policy, which eschews broad generalities, demands that the governing board exercise judgment in selecting issues contesting the board's powers.

Ultimately, all constitutionally autonomous higher education systems are subject to some degree of state government limitation. The importance of a legal structure which supports reasonable independence for the public higher education system is critical, but the quality of governance both for higher education and for state government depends on the participation of people. The actual autonomy of a higher education system may owe a greater debt to the leadership of concerned individuals than to constitutionally protected powers. The line between the state's power and the higher education system's autonomy may ultimately be resolved, not by judicial decision-making, but by responsible compromise and reasoned self-restraint.

APPENDIX

PERTINENT PROVISIONS OF SELECTED STATE CONSTITUTIONS

Alabama Constitution

Article 14, Section 264

> The state university shall be under the management and control of a board of trustees, which shall consist of two members from the congressional district in which the university is located, one from each of the other congressional districts in the state, the superintendent of education, and the governor, who shall be ex officio president of the board. . . .

Amendment 161, Section 1

> Auburn University, formerly called the Alabama Polytechnic Institute, shall be under the management and control of a board of trustees.

Alaska Constitution

Article VII, Section 2

> The University of Alaska is hereby established as the state university and constituted a body corporate. It shall have title to all real and personal property now or hereafter set aside for or conveyed to it. Its property shall be administered and disposed of according to law.

Article VII, Section 3

> The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The board shall, in accordance with law, formulate policy and appoint the president of the university. He shall be the executive officer of the board.

Arizona Constitution

Article XI, Section 1

> The Legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include kindergarten schools, common schools, high schools, normal schools, industrial schools, and a university (which shall include an agricultural college, a school of mines, and such other technical schools as may be essential, until such time as it may be deemed advisable to establish separate State institutions of such character.). . . .

Article XI, Section 5

> The regents of the University, and the governing board of other State educational institutions, shall be appointed by the Governor, except that the Governor shall be, ex-officio, a member of the board of regents of the University.

California Constitution

Article IX, Section 9

> (a) The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the university and the security of its funds. Said corporation shall be in form a board composed of seven ex officio members, to wit: the Governor, the Lieutenant Governor, the Speaker of the Assembly, the Superintendent of Public Instruction, the president and the vice president of the alumni association of the university and the acting president of the university, and 18 appointive members appointed by the Governor and approved by the Senate, a majority of the membership concurring; provided, however that the present appointive members shall hold office until the expiration of their present terms.
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> . . . . . .
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> (f) The regents of the University of California shall be vested with the legal title and the management and

disposition of the property of the university and of property held for its benefit and shall have the power to take and hold, either by purchase or by donation, or gift, testamentary or otherwise, or in any other manner, without restriction, all real and personal property for the benefit of the university or incidentally to its conduct. Said corporation shall also have all the powers necessary or convenient for the effective administration of its trust, including the power to sue and to be sued, to use a seal, and to delegate to its committees or to the faculty of the university, or to others, such authority or functions as it may deem wise. The Regents shall receive all funds derived from the sale of lands pursuant to the act of Congress of July 2, 1862, and any subsequent acts amendatory thereof. The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs, and no person shall be debarred admission to any department of the university on account of sex.

Colorado Constitution

Article VIII, Section 5

(1) The following educational institutions are declared to be state institutions of higher education: The university at Boulder, Colorado Springs, and Denver; the university at Fort Collins; the school of mines at Golden; and such other institutions of higher education as now exist or may hereafter be established by law if they are designated by law as state institutions. The establishment, management, and abolition of the state institutions shall be subject to the control of the state, under the provisions of the constitution and such laws and regulations as the general assembly may provide; except that the regents of the university at Boulder, Colorado Springs, and Denver may, whenever in their judgment the needs of that institution demand such action, establish, maintain, and conduct all or any part of the schools of medicine, dentistry, nursing, and pharmacy of the university, together with hospitals and supporting facilities and programs related to health, at Denver; and further, that nothing in this section shall be construed to prevent state educational institutions from giving temporary lecture

courses in any part of the state, or conducting class excursions for the purpose of investigation and study; and provided further, that subject to prior approval by the general assembly, nothing in this section shall be construed to prevent the state institutions of higher education from hereafter establishing, maintaining, and conducting or discontinuing centers, medical centers, or branches of such institutions in any part of the state.

(2) The governing boards of the state institutions of higher education, whether established by this constitution or by law, shall have the general supervision of their respective institutions and the exclusive control and direction of all funds of and appropriations to their respective institutions, unless otherwise provided by law.

Georgia Constitution

Article VIII, Section 4, Chapter 2-6701

There shall be a Board of Regents of the University System of Georgia, and the government, control, and management of the University System of Georgia and all of its institutions in said system shall be vested in said Board of Regents of the University System of Georgia. Said Board of Regents of the University System of Georgia shall consist of one member from each Congressional District in the State, and five additional members from the State-at-large, appointed by the Governor and confirmed by the Senate. The Governor shall not be a member of the said Board. The first Board of Regents under this Constitution shall consist of those in office at the time this Constitution is adopted, with the terms provided by law. Thereafter all succeeding appointments shall be for seven year terms from the expiration of the previous term. Vacancies upon said Board caused by expiration of term of office shall be similarly filled by appointment and confirmation. In case of a vacancy on said Board by death, resignation of a member or from any other cause other than the expiration of such member's term of office, the Board shall by secret ballot elect his successor, who shall hold office until the end of the next session of the General Assembly, or if the General Assembly be then in session to the end of that session. During such session of the General Assembly the Governor shall appoint the successor member of the

Board for the unexpired term and shall submit his name to the Senate for confirmation. All members of the Board of Regents shall hold office until their successors are appointed. The said Board of Regents of the University System of Georgia shall have the powers and duties as provided by law existing at the time of the adoption of this Constitution, together with such further powers and duties as may be hereinafter provided by law.

Hawaii Constitution

Article IX, Section 4

The University of Hawaii is hereby established as the state university and constituted a body corporate. It shall have title to all the real and personal property now or hereafter set aside or conveyed to it, which shall be held in public trust for its purposes, to be administered and disposed of according to law.

Article IX, Section 5

There shall be a board of regents of the University of Hawaii, the members of which shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. At least part of the membership of the board shall represent geographic subdivisions of the State. The board shall have power, in accordance with law, to formulate policy, and to exercise control over the university through its executive officer, the president of the university, who shall be appointed by the board.

Idaho Constitution

Article IX, Section 10

The location of the University of Idaho, as established by existing laws, is hereby confirmed. All rights, immunities, franchises, and endowments, heretofore granted thereto by the territory of Idaho are hereby perpetuated into the said university. The regents shall have the general supervision of the university, and the control and direction of all the funds of, and

appropriation to, the university under such regulations as may be prescribed by law. No university lands shall be sold for less than ten dollars per acre, and in subdivisions not to exceed one hundred and sixty acres, to any one person, company or corporation.

Louisiana Constitution

Article VIII, Section 5

(A) The Board of Regents is created as a body corporate. It shall plan, coordinate, and have budgetary responsibility for all public higher education and shall have other powers, duties, and responsibilities provided in this Section or by law.

. . . . . .

(D) The Board of Regents shall meet with the State Board of Elementary and Secondary Education at least twice a year to coordinate programs of public elementary, secondary, vocational-technical, career, and higher education. The Board of Regents shall have the following powers, duties, and responsibilities relating to public institutions of higher education:

(1) To revise or eliminate an existing degree program, department of instruction, division, or similar subdivision.

(2) To approve, disapprove, or modify a proposed degree program, department of instruction, division, or similar subdivision.

(3) To study the need for a feasibility of any new institution of post-secondary education, including branches of institutions and conversion of two-year institutions to institutions offering longer courses of study. If the creation of a new institution, the addition of another management board, or the transfer of an existing institution from one board to another is proposed, the Board of Regents shall report its written findings and recommendations to the legislature within one year. Only after the report has been filed, or, after one year if no report is filed, may the legislature take affirmative action on such a proposal and then only by law enacted by two-thirds of the elected members of each house.

(4) To formulate and make timely revision of a master plan for higher education. As a

minimum, the plan shall include a formula for equitable distribution of funds to the institutions of higher education.
(5) To require that every higher education board submit to it, at a time it specifies, an annual budget proposal for operational needs and for capital needs of each institution under the control of each board. The Board of Regents shall submit its budget recommendations for all institutions of higher education in the state. It shall recommend priorities for capital construction and improvements.

(E) Powers of management over public institutions of higher education not specifically vested by this Section in the Board of Regents are reserved to the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College, the Board of Trustees for State Colleges and Universities, and any other such board created pursuant to this Article, as to the institutions under the control of each.

Article VIII, Section 6

The Board of Trustees for State Colleges and Universities is created as a body corporate. Subject to powers vested by this Article in the Board of Regents, it shall have supervision and management of state colleges and universities not managed by a higher education board created by or under this Article.

Article VIII, Section 7

The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College and the Board of Supervisors of Southern University and Agricultural and Mechanical College are created as bodies corporate. Subject to powers vested by this Article in the Board of Regents, each shall supervise and manage the institutions, statewide agricultural programs, and other programs administered through its system.

Michigan Constitution

Article VIII, Section 4

The legislature shall appropriate moneys to maintain the University of Michigan, Michigan State University, Michigan College of Science and Technology, Central Michigan University, Northern Michigan University, Western Michigan University, Ferris Institute, Grand Valley State College, by whatever names such institutions may hereafter be known and other institutions of higher education established by law. The legislature shall be given an annual accounting of all income and expenditures by each of these educational institutions. Formal sessions of governing boards of such institutions shall be open to the public.

Article VIII, Section 5

The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan; the trustees of Michigan State University and their successors in office shall constitute a body corporate known as the Board of Trustees of Michigan State University. The governors of Wayne State University and their successors in office shall constitute a body corporate known as the Board of Governors of Wayne State University. Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds. Each board shall, as often as necessary, elect a president of the institution under its supervision. He shall be the principal executive officer of the institution, be ex officio a member of the board without the right to vote and preside at meetings of the board. . . . .

Article VIII, Section 6

Other institutions of higher education established by law having authority to grant baccalaureate degrees shall each be governed by a board of control which shall be a body corporate. The board shall have general supervision of the institution and the control and direction of all expenditures from the institution's funds.

Article VIII, Section 7

The legislature shall provide by law for the establishment and financial support of public community and junior colleges which shall be supervised and controlled by locally elected boards. The legislature shall provide by law for a state board for public community and junior colleges which shall advise the state board of education concerning general supervision and planning for such colleges and requests for annual appropriations for their support. The board shall consist of eight members who shall hold office for terms of eight years, not more than two of which shall expire in the same year, and who shall be appointed by the state board of education. Vacancies shall be filled in like manner. The superintendent of public instruction shall be ex officio a member of this board without the right to vote.

Minnesota Constitution

Article VIII, Section 4

The location of the University of Minnesota, as established by existing laws, is hereby confirmed, and said institution is hereby declared to be the University of the State of Minnesota. All the rights, immunities, franchises, and endowments heretofore granted or conferred are hereby perpetuated into the said university; and all lands which may be granted hereafter by Congress, or other donations for said university purposes, shall vest in the institution referred to in this section.

Mississippi Constitution

Article VIII, Section 213-A

The State institutions of higher learning now existing in Mississippi, to-wit: University of Mississippi, Mississippi State College, Mississippi State College for Women, Mississippi Southern College, Delta State Teachers' College, Alcorn Agricultural and Mechanical College, and Mississippi Negro Training School, and any others of like kind which may be hereafter organized or established by the State of Mississippi, shall be under the management and control of a Board of Trustees to be known as the

Board of Trustees of State Institutions of Higher Learning, the members thereof to be appointed by the Governor of the State with the advice and consent of the Senate. . . .

Such Board shall have the power and authority to elect the heads of the various institutions of higher learning, and contract with all deans, professors and other members of the teaching staff, and all administrative employees of said institutions for a term not exceeding four years; but said Board shall have the power and authority to terminate any such contract at any time for malfeasance, inefficiency or contumacious conduct, but never for political reasons.

Nothing herein contained shall in any way limit or take away the power of the Legislature had and possessed, if any, at the time of the adoption of this amendment, to consolidate or abolish any of the above named institutions.

Missouri Constitution (1875)

Article II, Section 5

The General Assembly shall, whenever the Public School Fund will permit and the actual necessity of the same may require, aid and maintain the State University now established with its present departments. The government of the State University shall be vested in a Board of Curators, to consist of nine members, to be appointed by the Governor, by and with the advice and consent of the Senate.

Montana Constitution

Article X, Section 9

(1) There is a state board of education composed of the board of regents of higher education and the board of public education. It is responsible for long-range planning, and for coordinating and evaluating policies and programs for the state's educational systems. It shall submit unified budget requests. A tie vote at any meeting may be broken by the governor, who is an ex officio member of each component board.

(2) (a) The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system and shall supervise and coordinate other public educational institutions assigned by law.

(b) The board consists of seven members appointed by the governor, and confirmed by the senate, to overlapping terms, as provided by law. The governor and superintendent of public instruction are ex officio non-voting members of the board.

(c) The board shall appoint a commissioner of higher education and prescribe his term and duties.

(d) The funds and appropriations under the control of the board of regents are subject to the same audit provisions as are all other state funds.

(3) (a) There is a board of public education to exercise supervision over the public school system and such other public educational institutions as may be assigned by law. Other duties of the board shall be provided by law.

(b) The board consists of seven members appointed by the governor, and confirmed by the senate, to overlapping terms as provided by law. The governor, commissioner of higher education and state superintendent of public instruction shall be ex officio non-voting members of the board.

Nevada Constitution

Article II, Section 4

The Legislature shall provide for the establishment of a State University which shall embrace departments for Agriculture, Mechanic Arts, and Mining to be controlled by a Board of Regents whose duties shall be prescribed by Law.

Article II, Section 6

In addition to other means provided for the support and maintenance of said university and common

schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.

Article II, Section 7

The Governor, Secretary of State, and Superintendent of Public Instruction, shall for the first four years and until their successors are elected and qualified constitute a Board of Regents to control and manage the affairs of the University and the funds of the same under such regulations as may be provided by law. But the Legislature shall at its regular session next preceding the expiration of the term of Office of said Board of Regents provide for the election of a new Board of Regents and define their duties.

New Mexico Constitution

Article XII, Section 13

The legislature shall provide for the control and management of each of said institutions by a board of regents for each institution, consisting of five [5] members, who shall be qualified electors of the state of New Mexico, no more than three [3] of whom at the time of their appointment shall be members of the same political party. The governor shall nominate and by and with the consent of the senate shall appoint the members of each board of regents for each of said institutions. The terms of said members shall be for six [6] years, provided that of the five [5] first appointed the terms of two [2] shall be for two [2] years, the terms for two [2] shall be for four [4] years, and the terms of one [1] shall be for six years.

Members of the board shall not be removed except for incompetence, neglect of duty or malfeasance in office. Provided, however, no removal shall be made without notice of hearing and an opportunity to be heard having first been given such member. The Supreme Court of the state of New Mexico is hereby given exclusive original jurisdiction over proceedings to remove members of the board under such rules as it may promulgate and its decision in connection with such matters shall be final.

North Dakota Constitution

Article 54

1. A board of higher education, to be officially known as the State Board of Higher Education, is hereby created for the control and administration of the following state educational institutions, to-wit:

(1) The State University and School of Mines, at Grand Forks, with their substations.
(2) The State Agricultural College and Experiment Station, at Fargo, with their substations.
(3) The School of Science, at Wahpeton.
(4) The State Normal Schools and Teachers Colleges, at Valley City, Mayville, Minot, and Dickinson.
(5) The School of Forestry, at Bottineau.
(6) And such other state institutions of higher education as may hereafter be established.

. . . . . .

5. The legislature shall provide adequate funds for the proper carrying out of the functions and duties of the State Board of Higher Education.

. . . . . .

6. (a) . . . As soon as said board is established and organized, it shall assume all the powers and perform all the duties now conferred by law upon the Board of Administration in connection with the several institutions hereinbefore mentioned, and the said Board of Administration shall immediately upon the organization of said State Board of Higher Education, surrender and transfer to said State Board of Higher Education all duties, rights, and powers granted to it under the existing laws of this State concerning the institutions hereinbefore mentioned, together with all property, deeds, records, reports, and appurtenances of every kind belonging or pertaining to said institutions.

(b) The said State Board of Higher Education shall have full authority over the institutions under its control with the right, among its other powers, to prescribe, limit, or modify the courses offered at the several institutions. In furtherance of its powers, the State Board of Higher Education shall have the power to delegate to its employees details of the administration of the institutions under its control. The said State Board of Higher Education

shall have full authority to organize or re-organize within constitutional and statutory limitations, the work of each institution under its control, and do each and everything necessary and proper for the efficient and economic administration of said State educational institutions.

(c) Said board shall prescribe for all of said institutions standard systems of accounts and records and shall biennially, and within six (6) months immediately preceding the regular session of the legislature, make a report to the Governor, covering in detail the operations of the educational institutions under its control.

(d) It shall be the duty of the heads of the several State institutions hereinbefore mentioned, to submit the budget requests for the biennial appropriations for said institutions to said State Board of Higher Education; and said State Board of Higher Education shall consider said budgets and shall revise the same as in its judgment shall be for the best interests of the educational system of the State; and thereafter the State Board of Higher Education shall prepare and present to the State Budget Board and to the legislature a single unified budget covering the needs of all the institutions under its control. "Said budget shall be prepared and presented by the Board of Administration until the State Board of Higher Education organizes as provided in Section 6 (a)." The appropriations for all of said institutions shall be contained in one legislative measure.

(e) The said State Board of Higher Education shall have the control of the expenditure of the funds belonging to, and allocated to such institutions and also those appropriated by the legislature, for the institutions of higher education in this State; provided, however, that funds appropriated by the legislature and specifically designated for any one or more of such institutions, shall not be used for any other institution.

Oklahoma Constitution

Article VI, Section 31

There is hereby created a Board of Regents for the Oklahoma Agricultural and Mechanical College and all Agricultural and Mechanical Schools and Colleges maintained in whole or in part by the State. . . .

Article XIII, Section 8

The government of the University of Oklahoma shall be vested in a Board of Regents consisting of seven members to be appointed by the Governor by and with the advice and consent of the Senate. . . .

Article XIII-A, Section 2

There is hereby established the Oklahoma State Regents for Higher Education, consisting of nine (9) members, whose qualifications may be prescribed by law. . . .

The Regents shall constitute a co-ordinating board of control for all State institutions described in Section 1 hereof, with the following specific powers: (1) it shall prescribe standards of higher education applicable to each institution; (2) it shall determine the functions and courses of study in each of the institutions to conform to the standards prescribed; (3) it shall grant degrees and other forms of academic recognition for completion of the prescribed courses in all of such institutions; (4) it shall recommend to the State Legislature the budget allocations to each institution, and; (5) it shall have the power to recommend to the Legislature proposed fees for all of such institutions, and any such fees shall be effective only within the limits prescribed by the Legislature. Added State Question No. 300, Referendum Petition No. 82. Adopted Special Election March 11, 1941.

Article XIII-B, Section 1

There is hereby created a Board to be known as the Board of Regents of Oklahoma Colleges, which shall consist of nine (9) members to be appointed by the Governor, by and with the consent of the Senate. . . .

Article XIII-B, Section 2

The said Board of Regents of Oklahoma Colleges shall hereafter have the supervision, management and control of the following State Colleges: Central State College at Edmond; East Central State College at Ada; Southwestern Institute of Technology at Weatherford; Southeastern State College at Durant; Northwestern State College at Alva; and the Northeastern State College at Tahlequah, and the power to make rules and regulations governing each of said institutions shall hereafter be exercised by and is hereby vested in the Board of Regents of Oklahoma Colleges created by this Act, and said Board shall appoint or hire all necessary officers, supervisors, and employees for such institutions.

South Dakota Constitution

Article XIV, Section 3

The state university, the agriculture college, the school of mines and technology, the normal schools, a school for the deaf, a school for the blind, and all other educational institutions that may be sustained either wholly or in part by the state shall be under the control of a board of five members appointed by the Governor and confirmed by the senate under such rules and restrictions as the Legislature shall provide. The Legislature may increase the number of members to nine.

Utah Constitution

Article X, Section 4

The location and establishment by existing laws of the University of Utah, and the Agricultural College are hereby confirmed, and all the rights, immunities, franchises and endowments heretofore granted or conferred, are hereby perpetuated unto said University and Agricultural College respectively.

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BIOGRAPHICAL SKETCH

Joseph Carl Beckham was born on the first of January, 1945, at Pensacola, Florida. He attended Escambia County public schools, then went on to the University of South Florida for undergraduate study. In 1966 he received a Bachelor of Arts degree in political science and, after working as a legal clerk in a land title agency, he enrolled at the Holland Law Center of the University of Florida, graduating with a Juris Doctorate in 1969.

From law school graduation until 1973, Joseph Carl Beckham pled cases before Florida circuit courts and taught courses in behavioral and social sciences at the University of Florida, utilizing summers to instruct courses for the North Carolina and Minnesota Outward Bound Schools. During this time the campus leadership fraternity, Omicron Delta Kappa, honored him as an "Outstanding Professor" at the University of Florida.

In 1974, after admission to candidacy for the doctorate in educational administration, Mr. Beckham became director of a State of Connecticut program designed to rehabilitate juvenile offenders. While director of this

program, he assisted Connecticut citizen's commissions in drafting legislation to end incarceration of status offenders and in developing proposals for the transfer of children's social services to a single state agency.

Returning to the University of Florida in 1976, Mr. Beckham served as a research associate on a series of studies conducted by the Institute for Educational Finance. He completed requirements for the degree of Doctor of Philosophy in June of 1977, emphasizing studies in the areas of education law, finance, and social and psychological foundations of education. His professional memberships include the American and Florida Bar Associations, the National Honor Society of Phi Kappa Phi, the Education Honor Society of Kappa Delta Pi, and the education leadership society of Phi Delta Kappa.

Mr. Beckham is married to Margo Nottoli, with whom he shares responsibility for a daughter, Sofie, born January 6, 1975.

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

S. Kern Alexander, Jr., Chairman
Professor of Educational Administration

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

James L. Wattenbarger
Professor and Department Chairman
of Educational Administration

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

Hal G. Lewis
Distinguished Service Professor
of Educational Foundations

This dissertation was submitted to the Graduate Faculty of the College of Education and to the Graduate Council, and was accepted as partial fulfillment of the requirements for the degree of Doctor of Philosophy.

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